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CONTENTS

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INDEX

THE
SOUTHWESTERN POLITICAL AND SOCIAL SCIENCE QUARTERLY

Vol. IV JUNE, 1923 No. 1

HISTORIES OF THE SUPREME COURT OF THE UNITED STATES WRITTEN FROM THE FEDERALIST POINT OF VIEW

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The history of the Supreme Court of the United States as a factor in the life of the American nation is beginning to be accorded greater consideration than heretofore by historians as well as by lawyers.[1] Hampton L. Carson was the first writer to present sketches of the lives of the justices with brief comments on important decisions of the court which are woven into a more or less connected story of the leading periods in the history of the Supreme Court.[2]

[1]The lives of the Chief Justices from Marshall to Taney were treated by Henry Flanders, in *The Lives and Times of the Chief Justices of the United States.* 2 vols. New York, 1875; and by George Van Santfoord, in *Sketches of the Lives and Judicial Services of the Chief Justices of the Supreme Court of the United States.* New York, 1854. In addition numerous volumes have appeared dealing with the lives of individual justices.

[2]*The History of the Supreme Court of the United States with Biographies of All the Chief and Associate Justices.* (Illustrated.) Philadelphia, 2nd edition, 1902. This work was published originally in 1892. The point of view of Mr. Carson is well stated in one of the paragraphs of the introductory chapter in which he writes:

"The establishment of the Supreme Court of the United States was the crowning marvel of the wonders wrought by the statesmanship of America. In truth the creation of the Supreme

A considerable part of national judicial history was worked over in the light of new and interesting historical data in the valuable work of A. J. Beveridge on "The Life of John

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Court with its appellate powers was the greatest conception of the Constitution. It embodied the loftiest ideas of moral and legal power, and although its prototype existed in the Superior Courts established in the various states, yet, the majestic proportions to which the structure was carried became sublime. No product of government, either here or elsewhere, has ever approached it in grandeur. Within its appropriate sphere it is absolute in authority. From its mandates there is no appeal. Its decree is law. In dignity and moral influence it outranks all other judicial tribunals of the world. No court of either ancient or modern times was ever invested with such high prerogatives. Its jurisdiction extends over sovereign states as well as over the humblest individual. It is armed with the right as well as the power to annul in effect the statutes of a state whenever they are directed against the civil rights, the contracts, the currency or the intercourse of the people. It restricts congressional action to constitutional bounds. Secure in the tenure of its judges from the influence of politics, and the violence of of prejudice and passion, it presents an example of judicial independence unattainable in any of the states and far beyond that of the highest court of England." I, 6, 7.

According to Mr. Carson, the judges ought to be statesmen as well as jurists and it is part of their function to determine principles which settle policies and preserve the welfare of the nation. He commends the attitude of the court insofar as it has aggressively upheld the national character of our government. Referring to the rather partisan Federalist opinions of some of the justices in the case of Chisholm *v.* Georgia, 2 Dallas 419, he commends their attitude "as of priceless value in determining at the very outset of our national career the true character of our government." I, 178. "It was left for Marshall," he continued, "after he had become firmly seated on the bench to lift the court into that serene and lofty atmosphere, which clothed it with the attributes of sovereignty beyond the reach of sceptres and crowns." I, 193.

Marshall's *obiter dictum* in the Marbury decision is commended and the political principles which the Chief Justice announced and which were particularly designed to criticize and offend President Jefferson are approved. I, 203, 205; and his opinion in the Burr trial which has been rather severely condemned by certain historians is also commended. I, 219. The twenty-fifth section of the Judiciary Act is referred to as a great triumph of Federalist centralization more important than a large part of the Constitution itself. I, 245.

Marshall."[3] After the lapse of about thirty years since the appearance of Carson's volumes another attempt has been made to scan the history of the Supreme Court, to shed sidelights on the justices and their labors, and, to emphasize anew the position and influence of the court in the life of the American nation.[3a]

This latter work by Mr. Warren is not, according to his introduction, a law book, but a section of our national history written for laymen and lawyers alike. The author set for himself a prodigious task, namely, to trace the history of the Supreme Court through the maze of decisions now comprised in Supreme Court reports, from the lives of the justices, from letters and other documents of the public men whose work affected the court, and, from the files of newspapers, magazines and other available sources of information. That this task, in accordance with the conditions and limitations set down, has been carefully and systematically done, the three volumes fully attest. One can not read the work without forming, as the author suggests "a new and enlarged conception of the Supreme Court's place in American History." Nor can any one "read the

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Similarly, the opinion of Marshall in the *Dartmouth College Case* that a legislative grant of a charter was in the nature of a contract which was protected by the federal Constitution and that acquired vested rights could not be interfered with by subsequent legislation is warmly defended. In addition to frequent commendatory remarks favorable to the Supreme Court in its support of the well-known principles of the Federalist Party, Mr. Carson practically ignores the views of Jefferson, Roane and Taylor as well as of many others who participated in the attack upon these principles, and Shirley's evidence relating to the political influences at work in the *Dartmouth College Case* (John M. Shirley, *The Dartmouth College Causes and the Supreme Court of the United States.* St. Louis, 1879), is barely referred to. Apparently from these pages one would imagine that the court moved on its way to the establishment of Federalist doctrines as a part of the American constitutional law with little opposition worthy of notice by legal historians.

[3]Albert J. Beveridge, *The Life of John Marshall*, 4 vols. Boston, 1916.

[3a]*The Supreme Court in United States History*, by Charles Warren, 3 vols. Boston, 1922.

history of the Court's career without marvelling at its potent effect upon the political development of the nation, and without concluding that the nation owes most of its strength to the determination of the judges to maintain the national supremacy."[4]

The investigations of the author have been so extensive that he may be pardoned for rather frequent references to episodes and incidents which were either "hitherto unnoticed" or were inadequately treated by other historians. The writing of these volumes has involved an enormous amount of work. They contain so much interesting information not heretofore accessible to the general reader, and shed such new and interesting light on the Supreme Court justices, their decisions, and the importance of their work in the history of the country, that one hesitates to point out certain defects of the work. Moreover, the immensity of the task undertaken and the wide differences in point of view on the issues involved in American judicial history render it inevitable that a work of this character would, as a matter of course, be open to some obvious criticisms.

With due appreciation of the contribution which the author has made to United States history, and mindful of the fact that each writer is necessarily influenced, as are the judges themselves, by training, temperament and political principles, it seems necessary to point out some of the defects and limitations of the work as a complete and authoritative history of the Supreme Court.

Looking at the matter from the standpoint of a complete history of the Court and its functions, it is to be regretted that out of a total of 1600 pages, about 800 are devoted to the history of the Court from 1789 to 1835—a period covered exhaustively by the important work of Beveridge,[4a] and treated rather fully in the general works on American history. The period from 1835-1888, which is inadequately treated, either in general or special histories, is covered in 687 pages, in which necessarily some important factors

[4] Preface, vii, ix.

[4a] *The Life of John Marshall, op. cit.*

and incidents relative to federal judicial history had to be commented on rather briefly. As a consequence of the extensive consideration of the work of the Court prior to the Civil War, the decades from 1888 to 1918 are summarily reviewed in the short space of 66 pages.

A certain lack of due proportion in this method of treatment may be indicated by a reference to the output of judicial decisions since the establishment of the Supreme Court. From 1789 to 1835 thirty-four volumes of reports were issued covering the decisions of the Supreme Court.[5] From 1835 to the death of Taney in 1865, thirty-four volumes were issued; from 1865 to 1888, fifty-nine volumes were issued. The total published volumes of reports, then, within the scope of the main portion of this history, covering the period from 1789 to 1888, are comprised in one-hundred and twenty-seven to one-hundred and twenty-eight volumes. Since 1888 there have been issued approximately one hundred and twenty-nine volumes of Supreme Court reports. The history of the Court therefore, as comprised within the scope of the author's volumes, covers relatively one-half of the output of the judiciary relating to the interpretation of constitutional law. The period covering the last one hundred and twenty-eight to one hundred and twenty-nine volumes is hurried over in a very brief summary.

It is obvious, of course, that the importance of the work of the Court does not depend merely on its output of decisions, and, it is apparent, also, that many of the decisions of Marshall, Taney and Chase are cited more frequently and are considered of greater import than more recent judicial pronouncements. But the significant thing is that all of the leading opinions of these justices have been modified considerably in their meaning and applications as a result of recent decisions. The original principles having been applied to new and radically different conditions, it becomes evident that an analysis which presents only these

[5] A considerable part of the Dallas reports are given to decisions of other courts.

early opinions and fails to trace their development within recent years, omits a large part of their significance in our present constitutional system. Such cases as *McCulloch* v. *Maryland, Gibbons* v. *Ogden, Brown* v. *Maryland, Dartmouth College* v. *Woodward* and many other precedents of these earlier periods have been so modified today that the changes are of greater significance than the formulation of the principles themselves in the original cases. There is, therefore, an element of disproportion in tracing the history of the Court to give the larger part of the treatment to relatively one-half of the product of the Court in its attempt to interpret and apply the federal Constitution and statutes.

With the excellent background now available, some historian might well begin with the Civil War and its aftermath and write the history of the Supreme Court during the time when most of existing constitutional law has been developed. It is not to be expected that one historian can cover adequately the entire field of the court's history, but it would no doubt have been very serviceable to the bar and to the general reader if the emphasis had been given to the treatment of the later rather than the earlier periods of American constitutional history.

The development of the due process and the equal protection phases of the Fourteenth Amendment into an effective check upon and a basis for the censorship of state legislation took place largely since 1880. For many years almost one-half of the cases coming before the Court dealing with constitutional issues were raised under the due process and equal protection clauses of the Fourteenth Amendment.[6] Likewise, at this time the judicial review of rate making by legislatures and commissions, and the surveillance by the courts of other administrative boards under the due process clause, the development of the doctrine of the police powers of the federal government and of the

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[6] E. S. Corwin, "The Doctrine of Due Process of Law before the Civil War," 24 HARV. L. REV. 366 (1910-11); also "Constitutional Law in 1919-1920," 15 AMER. POL. SC. REV. 69 (1921).

states, the great expansion of powers under the commerce clause with federal control of railways, and other means of transportation, have had the larger part of their growth. The regulation of business combinations and trusts through the Sherman Anti-Trust Act, the Federal Trade Commission, and the Clayton Acts in which the court has performed a definitive rôle began in 1890. Other phases of the growth of federal powers in which the Court has taken a prominent part are in the interpretation of the Constitution and statutes in the control of navigable waters and in the extension of admiralty jurisdiction, and, the limitation of the taxing powers of the states so as to protect federal authority. The management and control of large enterprises by the federal government have brought to the Court other important and difficult questions to settle. These are but a few of the new developments of the last forty years. One who ceases to tell the main story of the Court at the year 1888 naturally can give little consideration to some of the most important developments in American constitutional law. The author was privileged, of course, to select his own field but it would have been better to recognize more frankly the limits of the work as a partial history of the Court.

Again, many judicial decisions of great significance are so briefly referred to in the condensed statements of the author that a layman or a lawyer, unless he has recently been obliged to familiarize himself with constitutional law, will be unable to understand the issues involved. After a very short statement of the facts of the cases and of the question to be determined, the author as a rule gives long extracts from the newspapers and from political speeches with emphasis upon partisan opinions, favorable and unfavorable. One is naturally skeptical whether much is to be gained in understanding the work of the Court by such a free use of newspaper views and political speeches. If it is possible to judge from the major part of modern newspaper reports on leading Supreme Court cases, and from typical political speeches on the same, these would not be turned to as

sources of any considerable value in tracing the history of the Court of this period. Though some use may well be made of such material, a scissors and paste-pot method of repeating extracts and opinions gives undue weight to ephemeral views of editors or news gatherers, and becomes wearisome to the reader. It is more serviceable to have the important cases of the Court traced in detail with their various ramifications, and to have the opinions and public views pro and con digested so as to form a continuous narrative.[7]

The oft-repeated dictum of the justices that no act has ever been "declared to be repugnant to the Constitution because it appeared to the judicial mind that the particular exercise of constitutional power was either unwise or unjust" is treated as though it were a fact. Even if one is disposed to regard this assertion as a true statement some attention should be given to the observations of the justices themselves that other justices are condemning legislation as unwise and using constitutional phrases as a means to foster their own legal or economic policies.[7a] But if the justices do not frankly recognize that matters of policy or of wisdom and unwisdom lie at the basis of most decisions affecting the constitutionality of legislative acts, the development of due process of law into a broad rule of reason by which state and federal legislation is measured as to whether it is arbitrary, capricious, unfair, and discriminatory makes judicial review of legislative acts quite largely a consideration of the wisdom or unwisdom and the justice or injustice of legislative policies.

The chief point to which exception may be taken, however, with the author's work is the bias which is apparent

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[7]See, for example, a more effective use of historical material bearing on leading Supreme Court cases, *The Life of John Marshall*, by Albert J. Beveridge, III, chaps. III and IX, and IV, chap. V.

[7a]*Cf* Justice Holmes in Lochner *v.* New York, 198 U. S. 45, 75 (1905), and C. M. Hough, "Due Process of Law—Today," 32 HARV. L. REV. 232 (1918-19); also article by the writer on, "The Effects of Personal, Political and Economic Influences in the Decisions of Judges," 17 ILL. L. REV. 96 (1922).

in the treatment of certain phases of the consideration of the work of the court.

It is stated in the introduction:

> The court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent affected by inheritance, education and environment and by the impact of history, past and present; and, as Judge Holmes has said, "the felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which the judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[8]

Shortly after this observation, attention is called to a toast given in Washington at a dinner in 1801 in which the judiciary of the United States was referred to as "independent of party, independent of power and independent of popularity." These words, the author claims, have expressed the aim and substantially the achievement of the Court in the 120 years which have since elapsed.[9] It is to the latter dictum rather than to the former that Mr. Warren appears to adhere and which his volumes seem to be intended to sustain.

Apparently it is assumed that the main tenets of the old Federalist Party as against Anti-Federalism were sound and that the safety of the Union depended on them. The not unusual method of dealing with opinions in opposition to these doctrines by impeaching the motives of the opponents is employed. For example, it is regarded as statesmanship and sound jurisprudence to favor the doctrine of judicial review of legislation and all that the doctrine involves in American constitutional law but it is politics and demagoguery to oppose this doctrine. The well thought out views against judicial review with its implications by such men as Jefferson, Madison, and Justice Swift, and

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[8] I, 2.

[9] *Ibid.*, 20.

Monroe and Justice Gibson, Martin Van Buren, Jackson, and Buchanan, and many others are disposed of as "extreme statements" or as "surprising suggestions."[10] A unanimity of opinion is discovered in favor of judicial review from 1790-1810, which an impartial survey of evidence fails to substantiate.

It is made to appear that opposition to judicial review by the federal courts as applicable to acts of Congress did not appear until after partisan lines were clearly drawn between Jefferson and his opponents in the debates over the repeal of the Federalist judiciary act of 1802.[11] And thus credence is given to the idea that such opposition was the result almost entirely of partisan politics.

Such an interpretation fails to give due weight to the determined opposition to judicial review by eminent lawyers and judges in the states during this period and by several members of the constitutional convention at Philadelphia. It ignores the doubts and uncertainty of certain Supreme Court justices. But most important of all, it fails to do justice to the opinions of a large number of Democratic-Republicans when the Kentucky and Virginia Resolutions were under debate in 1798 and 1799, who frankly did not accept the theory that the function of passing on the constitutionality of acts of Congress belonged to the federal judiciary. To quote a typical Republican opinion:

> It is impossible to conceive a doctrine more opposed to the Constitution of our choice than that a decision as to the consti-

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[10]See criticism of Jefferson's proposal to have some sort of a popular referendum on decisions of the courts relating to legislative and political questions, I, 293, II, 115-116. For a review of some of the views opposing judicial review, *cf.* C. G. Haines, *The American Doctrine of Judicial Supremacy*, chaps. IV, VII, and IX-XII.

[11]Vol. I, 215: "The right of the judiciary to pass on the constitutionality of acts of Congress had not been seriously challenged until the debate in 1802 on the Circuit Court Repeal Act. Prior thereto it had been almost universally recognized and even in 1802 it was attacked purely on political grounds and only by politicians from Kentucky, Virginia, North Carolina and Georgia." I, 256. For a different conclusion, see Beveridge, *op. cit.*, III, 105.

> tutionality of all legislative acts rests solely with the judicial department; it is removing the corner-stone on which our federal compact rests; it is taking (power) from the ultimate sovereign and conferring it on an agent appointed for specified purposes.[12]

Such opposition is referred to as "an unexpected and unaccepted doctrine."[13] To cast reflections on the motives of those who supported Democratic-Republican doctrines, it is claimed that their views of the Constitution were primarily influenced by an effort to protect land titles in Virginia and Kentucky.[14] No doubt economic factors had much influence in determining the political views of the Democratic-Republicans.[15] But why take pains to bring out this fact and ignore the story of the intricate connections of commercial and capitalist interests which working through Hamilton and other leading Federalists set about to establish courts independent of popular control with the right to review legislation and designed to protect property and contracts at all hazards.[16]

The Federalists quite generally regarded the federal judiciary as the proper authority to decide finally and authoritatively on the constitutionality of federal laws. Some Republicans agreed with this view. But so far as evidence is available a majority of the Republicans shared the views of Madison and Jefferson as expressed in the resolutions which repudiated the doctrine of final and exclusive power

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[12]F. M. Anderson, "Contemporary Opinions of the Virginia and Kentucky Resolutions," *American Historical Review*, V, 58.

[13]Warren, I, 216.

[14]*Ibid.*, I, 218, 219. See also I, 99, where opposition to the decision in the *Chisholm Case* is put largely on economic grounds.

[15]*Cf.* C. A. Beard, *Economic Origins of Jeffersonian Democracy.*

[16]Beveridge, *op. cit.*, III, 568, 569, and 571. See especially opinion of Hamilton as attorney for the land speculators to the effect that the Georgia rescinding act in the case of Fletcher *v.* Peck was invalid because "every grant . . . whether [from] . . . a state or an individual is virtually a contract." Hamilton prophesied that the courts of the United States would pronounce the act void as a violation of the contract clause of the Federal Constitution.

in the federal courts to pass on the constitutionality of acts of Congress.[17]

At every convenient opportunity the work of the justices in developing the doctrines of the Federalist Party through court opinions and judgments is commended and what are conceived as the great gains to the country from their quasi-political decisions are emphasized.[18]

There was a time when most American histories were written with a decided bias from the Federalist point of view. It was taken for granted that the safety and perpetuity of the Union depended upon the gradual acceptance of the main Federalist principles. Among the features of the Federalist program especially as relates to the judiciary were: (1) a strong federal government whose powers were to be expanded by an implied power doctrine permitting those things to be assumed by the federal government which might be deemed of national importance;[19] (2) a judiciary independent of the other departments and in many respects independent of the nation itself; (3) a doctrine of judicial review whereby the judicial department,

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[17]For an interpretation of these resolutions, which seems unwarranted from the texts themselves and from contemporary exposition, see I, 388. See also, 448, as to later attitude of Democrats.

[18]See for example, reference to "a sturdy, independent and courageous federal judiciary," I, 388; also I, 491, for commendation of decision in *Dartmouth College Case;* II, 168, approval of court's "nationalistic attitude."

[19]*Cf.* Hamilton's "Opinion on the Constitutionality of a National Bank" in which he argued for "implied" and "resulting" powers—the implied powers to include in addition to express powers all those that are "needful, requisite, incidental, useful or conducive to" the carrying out of the express powers. "It leaves therefore," Hamilton continued, "a criterion of what is constitutional and of what is not. This criterion is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure has any obvious relation to that end and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." Hamilton's Works (ed. 1851), IV, 104 ff. See opinion of Marshall in McCulloch *v.* Maryland, 4 Wheaton 516 (1819) in which this doctrine is adopted as a principle of construction.

independent of any real effective popular control, could, through its function as guardian and protector of the fundamental law, hold in check all departments of the governments including the direct representatives of the people;[20] (4) a theory of vested rights whereby acquired rights of property and of contract might be protected by these independent courts regardless of whether or not constitutions expressly provided for such protection.[21]

The basic features of this program were formulated by

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[20]See Hamilton's argument in No. 78 of *The Federalist*, which was adopted by Chief Justice Marshall in Marbury *v.* Madison, 1 Cranch 137 (1803), and Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819).

[21]See Opinion of James Wilson on protection of vested rights, 7 *Journal American Bar Association* (March, 1921), 125 ff. and opinion of Alexander Hamilton, Beveridge, "*Life of Marshall*," III, 568 ff. *Cf.* adoption of these views by Chief Justice Marshall in Fletcher *v.* Peck, 6 Cranch 87 (1810); also E. S. Corwin, "The Basic Doctrine of American Constitutional Law," 12 MICH. L. REV. 247 (1914).

Although New England Federalism was probably an extreme form of the advocacy of the principles of this party, the following extract indicates to some extent the point of view of the party as a whole:

> "Federalism has opposite connotations in Europe and America and a very special meaning east of the Hudson. New England Federalism was at once a political system, and a point of view. Sired by Neptune out of Puritanism, the teacher of its youth was Edmund Burke. Washington, Hamilton, and Fisher Ames formed the trinity of its worship. Timothy Pickering was the kept politician of New England Federalism, Harrison Gray Otis, its spellbinder, Boston, its political, and Hartford, its intellectual capitol, Harvard and Yale the seminaries of its priesthood. New England Federalism believed that the main object of government was to protect property, especially commercial shipping property; and it supported nationalism or states' rights according as the federal government protected or neglected these interests of maritime New England. It aimed to create and maintain in power a governing class of educated, well-to-do men. Regarding Jeffersonian Democracy a mere misbegotten brat of the French Revolution, New England Federalism directed its main efforts toward choking the parent, hoping thereby either to starve the progeny, or wean it from an evil heritage," S. E. Morison, "*Maritime History of Massachusetts*," 160.

such men as James Wilson[21a] and Alexander Hamilton, were adopted as principles of constitutional interpretation when John Marshall ruled as head of the Supreme Court, and were espoused by Joseph Story[22] and James Kent with a determination to admit no defeat until they were safely incorporated as fundamental principles of public law throughout the United States. Kent in his *Commentaries*[23] and Story in his *Commentaries on the Constitution* and other treatises which became standard texts for lawyers and judges alike helped to give currency to these ideas and to put them under a common law cloak. Webster in his masterful arguments before the Supreme Court and in his great orations helped to impress these doctrines upon the people who came under his magic power. The underlying issue of all of the Federalist principles, namely, nationalism vs. states' rights, resulted in such a cleavage that war was resorted to and seemingly nationalism triumphed. But how complete this triumph was, appeared in doubt for some time until Congress and the Supreme Court following

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[21a] *Cf.* L. H. Alexander, "James Wilson," 183 *North American Review*, 971.

[22] It is to be noted that Story was appointed by Jefferson and was thought to be a Democratic-Republican. There were indications that he was turning Federalist before his appointment to the Supreme Court and he soon became stronger in the advocacy of Federalist principles than Marshall himself. See, for example, his opinions in Martin *v.* Hunter's Lessee, 1 Wheat. 304 (1816), Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819), and Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 (1887). Writing to Kent relative to the *Dartmouth College Case*, Story urged him "to lay before the public in a popular shape, the vital importance to the well-being of society, and the security of private rights of the principles on which that decision rested. Unless I am very much mistaken these principles will be found to apply with an extensive reach to all the great concerns of the people, and will check any undue encroachments upon civil rights, which the passions or the popular doctrines of the day may stimulate our state legislatures to adopt. *"Life and Letters,"* I, 331.

[23] I *Commentaries* 456 (12th ed.); Dash *v.* Van Kleeck, 7 Johns 477, 498 (1911) and Gardner *v.* Newburgh, 2 Johns 162, 166, 167 (1816). (See also, Corwin, 12 MICH. L. REV. 261 ff).

the Federalist principles of the early part of the nineteenth century expanded to the utmost the doctrine of implied powers[23a] and by incorporating the vested rights doctrine in the Fourteenth Amendment with the correlative principle of implied limitations on legislatures, and forging a new rule of reason under this amendment began to set marked limits to the field of state activity. Today these principles of Federalism are looked upon as fundamentals of American public law.

Beginning with the defeat of John Adams by Thomas Jefferson for the presidency the advocates of Federalism began a form of propaganda to the effect that the fate of the Union depended upon a complete acceptance of the principles of this party. The defeat of Federalism would ultimately mean the downfall of the Union. The espousal of Federalism was the sole method of saving the Union. Opponents were not only condemned but were to be despised as enemies of the Union itself. The Federalist cult which has had a profound effect on American life[24] is seen in its most extreme form in the histories of the Supreme Court. American history as it affects the conflict over state and federal rights is being rewritten from a point of view relatively new and with a greater degree of impartiality as between the great contesting factions. Histories of the

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[23a] See, for example, Legal Tender Cases, 12 Wall. 457 (1871) and Juilliard *v.* Greenman, 110 U. S. 421 (1884).

[24] "Political intolerance" became "a leading characteristic of the entire Federal party," S. E. Morison, *Harrison Gray Otis*, I, 155. The leading Federalist had one idea, namely, to suppress democracy, Jeffersonian Democracy was they thought "a prelude to universal chaos," *Ibid.*, 265. See also prophecy of Robert Goodloe Harper, "the principles on which the Federalists have acted must be adopted, their plans must be substantially pursued or the government must fall to pieces," *Ibid.*, 211; and comment of Fisher Ames as to "Federalists, who alone will or can preserve liberty, property or Constitution," *Works*, 298, 316. The Federalist party ceased to exist from 1820 to 1828 when the more liberal members of the party joined the Democrats and the conservatives entered the newly formed Whig party. Federalism as a social cult survived for many years the downfall of the party. Morison, *op. cit.*, II, 248 ff.

Supreme Court, however, still breathe the spirit of militant Federalism which no longer permeates general historical writing except when deliberately presented for partisan purposes. This point of view is apparent in Carson's volumes and to some extent mars the treatment of the Court's history under the direction of Marshall by Beveridge.[25]

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[25]In a review of Beveridge's *"Life of Marshall,"* Professor A. C. McLaughlin maintained:

"The most serious criticism to be brought against the volumes is that they are in some respects essentially partisan. Once more we find a treatment written from the point of view of the Federalists, and there is nothing new in that attitude or method of approach. Though the author is not totally unaware, it seems, of the underlying social history, and possibly not unaware of the real nature of American social and political developments, we are not furnished a calm portrayal of the great forces of the time, and above all, we are not led by sympathetic and intelligent means to see those forces of social and political development which made the America of the nineteenth century. To the historian it should make no essential difference whether he approves of a line of social advance and struggle or not; he has to try to tell what was done; and though few of us can ever succeed in reaching complete detachment and perhaps ought in some cases to have distinct opinions as to what was at a given time wise or dangerous, an effort must be made to present both sides with absolute fairness. . . . Whether we like the principles of Jeffersonian freedom or like them not, these are the principles which blossomed in America, and made America to be, not Europe, but itself. To miss that fact is to miss at the very least half the story, to be blind to the spirit of freedom and hope, the creative spirit of developing liberalism, and democracy. If, I repeat, the author has no belief in the value of these ideals, or thinks them discredited and always dangerous, how can he nevertheless, if he sees them at all, fail to recognize them for what they were, and treat them with respect? There were many things to be done in America besides making a national constitution and holding the Union together, wonderfully appealing as those deeds are to us. America had in addition to find expression for her real self, live out the fundamental purposes of democratic life, make actual, if she could, the philosophy of belief in men and their capacity for self-control, widen and strengthen popular participation in government, make government the actual representative of an uncowed people, believing in themselves."

After contrasting the views of Marshall and Jefferson, Professor

Though newspaper files, memoirs and political speeches, and other available sources were searched with great care for views pro and con on many of the controversies which came before the Supreme Court, and though considerable attention is given to the critics of the Court, Warren apparently ignores certain testimony not in accord with his own point of view, slurs over occurences not entirely creditable to the Court, deals at times unfairly with the democratic and popular views which were necessarily opposed to the constitutional views of such Federalists as Hamilton, Webster and Story. It is taken for granted in describing the work of the Court that its unflinching advocacy of Federalist and nationalist principles kept the Union in the only safe course and that it was one of the constant aims of the Democrats to weaken the position of the courts and thus to endanger the Union.

It is, of course, difficult to refute the contention that Federalism saved the Union and that the views in opposition had they been adopted would have destroyed the Union. Jefferson and many of his followers after believing in a somewhat mild form of judicial review of legislation and in certain other checks on popular rule, came to the conclusion, as a result of political experience, that on vital issues it was better that the will of the people or more literally that the will of the electorate ought to prevail rather than to set up an oligarchy of judges or other officials who were presumed to know what the people wanted. Just as Hamilton, Marshall and Webster thought it better from the standpoint of political expediency to keep certain matters, especially relating to property and contracts out

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McLaughlin calls attention to the failure of Mr. Beveridge to present satisfactorily the views of Jefferson and others in opposition to many of Marshall's quasi-political decisions, and deplores the fact that the reader should be left with the feeling that opposition to Federalism was all based on ignorance, narrow localism and political jealousy. Attention is also called to the fact that a treatment of *Marbury* v. *Madison*, the *Burr Trial* and other great cases, is colored by partisanship and that the opposing theories receive undue consideration. 7 *American Bar Association Journal* 231-233 (May, 1921).

of the hands of the electorate so the Democrats on the same grounds tended to favor ultimate popular control even over private rights. In most respects the Hamilton-Marshall theories have been adopted in American constitutional law and the Jeffersonian popular control theory has been discarded, at least, so far as fundamental personal and private rights are concerned.[26] But it is significant that a modified form of the Democratic theory has been in operation in England since the adoption of cabinet or parliamentary government. Property, contracts and vested rights in England are protected so far as the people through their representatives in Parliament choose to protect them and the voters through the ballot may when they see fit overturn

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[26]Jefferson and his followers though led by political experience to oppose judicial review of legislation in the nation and in the states and to deny the validity of the doctrine of implied limitations on legislatures to protect property and vested rights did not feel sure of their ground and developed rather slowly concrete proposals to take the place of judicial supremacy. The cabinet system of England had not been effectively developed and Jefferson was not likely to turn to this nation for guidance. But during the debate over the *Judiciary Act* in 1802 something approaching the cabinet form of government was suggested as the proper alternative to the judicial check. This idea was later advocated by Jefferson and put in more concrete form in the controversy between the executive and the courts over the bank issue in Jackson's administration. Senator White expressed Jackson's view as to the main issue: "The honorable Senator argues that the Constitution has constituted the Supreme Court a tribunal to decide great constitutional questions such as this; and that when they have done so the question is put to rest, and every other department of the government must acquiesce. This doctrine I deny. The Constitution vests 'the judicial power in a Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.' Whenever a suit is commenced and prosecuted in the courts of the United States, of which they have jurisdiction, and such suit is decided by the Supreme Court—as that is the court of last resort, its decision is final and conclusive between the parties. But as an authority it does not bind either the Congress or the President of the United States. If either of these coordinate departments is afterwards called upon to perform an official act, and consciously believes that performance of that act will be a violation of the Constitution they are not bound to perform it, but, on the contrary, are as much at liberty to decline acting as if no such de-

or recall judicial decisions.[26a] With some slight exceptions the Democratic or popular control theory has been adopted in other English speaking countries like Canada, Australia, and South Africa where there are no bills of rights and few special or implied limitations on legislatures.[27] The same theory forms a constituent part of the government of France and of many constitutions based upon the French system.[28] In fact the majority of the countries of

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cision had been made. . . . If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute. Each of the departments is the agent of the people, doing their business according to the powers conferred; and where there is disagreement as to the extent of these powers, the people themselves, through the ballot boxes, must settle it." See Van Buren *"Inquiry into the Origin and Cause of Political Parties in the United States*, 329-330.

[26a]*Cf.* Taff Vale Ry. *v.* Amalgamated Society of Railway Servants (1901) A. C. 426 and Trades Disputes Act of 1906 which nullified that decision; also Re Grand Trunk Arbitration, 57 D. L. R. 8 (1921) involving the question of the valuation of the plant in an agreement by which the Canadian government took over the Grand Trunk Railway system.

The opinions of the arbitrators, Sir Walter Cassels and Sir Thomas White, give the English-Canadian point of view favoring public interests. Justice Taft in his dissent states a representative American point of view as to the necessity of protecting vested rights. "The only adjudicated cases," says Justice Taft "on the subject of fixing railway rates are in the United States. There are no English cases. There are no Canadian cases." Such questions are not settled by courts in England and Canada.

[27]It is a significant fact that the doctrine of affording special protection to vested rights through judicial control was deliberately rejected by Canada and Australia. For a comparison of the American system of the protection of private rights and the systems of other countries, see W. F. Dodd, "Political Safeguards and Judicial Guaranties," 15 COL. L. REV. 293 (1915).

[28]There seems to be a movement in France to adopt certain features of the American doctrine of judicial review of legislation but most Frenchmen are opposed to combining with this principle the special protection of property and contracts which makes the American doctrine unique among governmental systems of the world. See Lambert, "Le government des juges at la lutte contre la législation sociale aux Etats-Unis," Paris, 1921. Also, Larnaude, "Bulletin de la *Société de Législation Comparée* XXXI (1901-1902), 175-229,240-257.

the world with the growth of democratic government have accepted the doctrine of practically complete popular control similar to that advocated by the Jeffersonian Democrats. Outside of the United States it is rarely conceived as possible that courts will interpose their judgment to check the matured policies of the legislative and executive departments. It is with fine irony that Frenchmen who are frequently thought of as advocates of monarchy or bureaucracy condemn the American doctrine of judicial review as a feature too undemocratic to adopt in their country.

But would the democratic theory of popular control, which has been so long practiced in the British Empire and has been so very generally adopted elsewhere, have proved destructive if adopted in the United States? No one can say. But some conjectures may be in order.

If more complete ideas of popular control had prevailed the process of centralization would no doubt have moved more slowly with perhaps some temporary setbacks. It is doubtful whether broad construction of the Constitution so as to extend the powers of the federal government would have become such a grave political issue in which the Court was to a large extent the center of attack from 1815 to 1835.[29] It was in this period when the court in its political inclinations had marked Federalist tendencies and the other departments of government were under Democratic control that resistance to federal encroachments developed a spirit of bitterness which often brought threats of rebellion.[30] The states feared federal encroachments on commerce and transportation, on slavery, and on internal improvements, and, the sentiment was frequently expressed that it was better to endure rebellion than to become "slaves of a great consolidated government."

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[29]Vol. II, 4; see letters of Jefferson relating to the judiciary and publications of John Taylor of Virginia "Construction Construed and Constitution Vindicated"; "New Views of the Constitution," "Tyranny Unmasked."

[30]*Cf.* contest over Cohens *v.* Virginia II, 7 ff. and II, 83-84 regarding resistance of South Carolina in 1823.

Marshall and other Federalist leaders tried to make it appear that an attack on the centralizing tendencies of Congress and the Supreme Court was an attack upon the Union. The Federalists under the leadership of Marshall and Webster wished to convert by means of interpretation, what was thought by the majority of the people to be a confederate form of government with the center of gravity in the states, to a federal government with undoubted national supremacy and an unlimited opportunity for development of federal powers.[30a] When a court participates in the settlement of such a grave political issue it must of necessity be subject to acrimonious public attacks. And the fact that this department was beyond the ordinary reach of popular control made the resentment of opponents of its decisions having political implications all the greater. It was quite generally believed that the Court was "silently absorbing rights of the states, and destroying those of the people, without attracting that attention which the magnitude of the interests required."[31]

If Democratic policies had prevailed, the spirit of bitterness which developed from the covert undermining of state powers would have had a more natural outlet and the determination to protect the states' powers and rights at any cost would have had less to feed upon. With a more natural and easy outlet for political feelings and prejudices and greater free play for particularist tendencies may it not have been that the issues of expansion and of slavery could have been dealt with and settled without such long, severe and bitter controversies?

Again if the Federalist doctrines of protection to vested rights and of implied limitations on legislatures in favor of private rights of person and of property had been rejected, the economic and industrial development of the country through private capital, would, of course, have been less rapid. Public interests would have prevailed where pri-

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[30a]See W. W. Willoughby, *The American Constitutional System*, Chs. 2, 3.

[31]II, 432.

vate interests gained ascendancy under the Federalist regime. Private property and corporate interests would not have become so impregnably intrenched as to be in many respects quite beyond public control. The political situation as to labor and capital and the protection of private rights would probably be somewhat as it has been in England for several centuries and as it has been in Canada since 1867, and similar to what it is in many other countries which have never adopted the doctrine of vested rights superior to and beyond governmental authority.

The important matter which historians of the Supreme Court frequently do not appear to realize is that there have been two great political divisions in American politics—a conservative, and a commercial or industrial group —and an agrarian, democratic, populistic group.[32] Hamilton, Marshall, Webster, Story and Kent are the great leaders of the first group, Jefferson, Madison, Jackson, Van Buren, Buchanan, and to a certain extent Lincoln of the second. Each group has had many followers of eminence

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[32]The foremost issue of American politics is foreshadowed in the comment of John Adams that the Federal Convention itself was largely the result of a combination of commercial people and property owners and that the Constitution could not have been adopted had it not "received the active and steady cooperation of all that was left in America of the attachment to the mother country, as well as the moneyed interest, which ever points to strong government as surely as the needle to the pole." *Works* I, 411-443. The agrarian, paper money, debtor groups constituted a majority of the people but despite this fact they were outwitted and the Constitution was adopted. After its adoption the commercial and moneyed interests gathered under the leadership of Hamilton to form the Federalist party and though not accepting all of the principles of the agrarian group Jefferson became the leader of this party. Says Mr. Morison, "To Hamilton's standard flocked the mercantile, non-agricultural classes throughout the Union, who were interested in a strong and efficient government, sound finance, and a vigorous foreign policy . . . Jefferson, on the other hand, united and typified the agricultural classes, which looked with suspicion on financial schemes they did not understand, and saw in the Hamiltonian system only an attempt to corrupt the government and pave the way for a monarchy." *Harrison Gray Otis*, I, 46, 47.

and each has rendered distinct contributions to the enduring features of the American government. There is not a Federalist principle which has not been modified under Democratic hegemony so as to render it more adaptable to the principles of popular government. Similarly the Federalists have made positive contributions which have changed the entire character of American politics. It is no longer a fair and reasonable attitude to uphold the leaders and political principles of one of these groups to commendation and to treat systematically the leaders and political principles of the other with more or less open and concealed contempt. The contributions of each great party have made the American government what it is today and there is no apparent reason why the truth may not be told without fear or favor as to the share of each in making this government what it is.

Since the Federalist doctrine of according to courts the right to pass on the validity of legislative acts has been adopted the judiciary from the nature of the case must deal with political issues. It becomes imperative, therefore, in reviewing the judicial history of the country to deal sympathetically and impartially with the great political leaders and tendencies of the times.

In order to think highly of the Supreme Court and to regard its work of great significance in the life of the American nation it is not necessary to ignore or to suppress unfavorable incidents relating to individual members of the Court and bearing upon the conduct of the court itself in relation to some of the great political issues of the nation. The effort such as that of Mr. Carson to cast a glamour and halo around the members of the Court and to dole out effusive praise whether the occasion warrants or not largely defeats its own end. To interest the reader and to continue his interest it is necessary to recognize that the justices are human and that along with their arduous labors and great achievements for the nation they give constant evidences of some of the weaknesses and frailties of the human species. Both Beveridge and Warren give throughout the human touch which makes their accounts interest-

ing. Both, however, have omissions and other defects which appear to be attributable to bias or to a quasi-partisan weighing of historical records and evidence.

Warren defends Marshall's political dissertation in the *Marbury Case* which stripped of its apparent partisan bias, designed as a lecture to the President, fails to give any sound reason for the exercise of judicial review and amounts simply, as Justice Gibson[32a] clearly pointed out, to an assumption at the outset of the whole ground in dispute and the formulation of specious reasons to support the assumption. There was no basis for the contention that a written constitution required the exercise of such a power of review of legislation by the courts. The idea that the oath of the judges—the same oath taken by the President and other federal officers—gave warrant for such unusual powers now seems ludicrous. The doctrine of superior and inferior laws every one accepted but not so the assumption of Marshall that the Court alone must decide which are superior and which are inferior. The Constitution did not expressly grant such power to the courts unless an interpretation were placed upon that instrument which read certain ideas and dogmas into it. That interpretation was at hand in the masterful argument of Hamilton in the seventy-eighth number of *The Federalist*. Marshall adopted Hamilton's reasoning and the reasoning of both is based on the fundamental hypothesis that legislatures are not to be trusted and that the opinions of judges on the validity of legislative acts has an inherent superiority over the opinions of legislators.

This was sound Federalist philosophy and it makes it none the less a Federalist policy when announced from the bench by the chief justice in what is confessedly a moot case.[33]

[32a] Dissenting opinion in Eakin *v.* Raub, 12 S. & R. 330 (Penn. 1825).

[33] Though historical evidence shows rather conclusively that a major portion of the people actively interested in affairs of government in the United States from 1780 to 1820 supported the general idea of judicial review of legislation, it was the Federalist con-

Mr. Warren does not fail to point out how personal, selfish or political motives influenced those who stood in the way of what seemed to him the only course for American judicial history. He does not, however, tell of the close connections of Justice Wilson with the Yazoo frauds in Georgia,[34] and he disposes of the incident of Chase's career which led to a vote of censure and severe condemnation by the legislature of Maryland by a mere reference to "certain contractor's frauds which his enemies had greatly exaggerated."[34a] Nor is the reader given any idea of the astute measures of the leading Federalists, many of whom held stock in companies which had participated in either the securing of a fraudulent grant of millions of acres of land from the Georgia legislature or the sale of stock with the purpose of profiting by the fraudulent grant, in bringing a case before the Supreme Court so that the Federalist doctrine of the sanctity of contracts might be applied to a state legislature in making a grant despite the notorious fraud and other circumstances surrounding the grant. In this case as in certain others there was a well planned and united campaign to get a stirring political issue before the Supreme Court to secure a pronouncement which might be used to protect the property of those interested and might at the same time predicate a basis for securing them from further attacks.

Each of the three historians of the Court practically ignores the evidence which has been accumulated and published as to the underhand and somewhat sinister methods employed to play on the political opinions and prejudices of the justices in the *Dartmouth College Case* thereby changing an unfavorable attitude toward the old corpora-

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ception of this doctrine which Marshall helped to make a part of federal constitutional law and which was developed as a fundamental feature of state constitutional law.

[34]Charles H. Haskins, "Yazoo Land Companies," *American Hist. Assn. Papers*, V, 83; M. C. Klingelsmith, "James Wilson and the So-called Yazoo Frauds," 56 U. OF PA. L. REV. 1 (1908), 61 *The Independent* 1355 (Dec. 6, 1906).

[34a]*Cf.* Pamphlet by W. C. Ford on "Hamilton's Publius," Washington, 1886, and 85 *The Nation* 441.

tion to a favorable one. Much of this evidence was compiled and presented by Shirley in *The Dartmouth College Causes*. Carson merely cites Shirley's volume in a few instances without any indication of the effect of the evidence collected on the consideration of the case. Beveridge refers to Shirley's work but disposes of his evidence on the *Dartmouth College Case* in a foot note with unfavorable comments on the author's observations and conclusions.[35] Such a neglect or summary disposition of the letters, documents and contemporary evidence relating to this case can only be accounted for by the fact that the authors think it wise for the good of the cause they are furthering not to let all of the truth be known. If Shirley's observations and conclusions are unsound and are only deserving of condemnation the letters of Webster and Story and other memoirs furnish an unimpeachable account which cannot be disposed of in such a cavalier fashion. Webster writes freely of his attempt to argue the case on general principles in which political principles and prejudices would have considerable influence. He tells in some detail of his efforts to get a moot case before the federal courts which would raise issues in which these general principles involving the protection of vested rights might be applied by the Supreme Court, of Story's approval and assistance in this plan, of the use of Story to influence Kent and through Kent to reach other justices of the Supreme Court. It is intimated that Marshall who withheld the decision on the case for eleven months, after the arguments were rendered, was in sympathy with this plan and this seems to be borne out by the summary disposal of the case when a majority of the justices had been won over to the cause of the old corporation.[35a] Though Pinkney was prepared to reargue the case for the new corporation when the Court again convened and though changed conditions would have war-

[35] *The Life of Marshall*, IV, 258, 259; the author concludes "his [Shirley's] volume has had a strong and erroneous effect upon general public opinion."

[35a] Jesse F. Orton, "Confusion of Property with Privilege: Dartmouth College Case," *The Independent*, August 19 and 26, 1909.

ranted a reargument Marshall refused to hear Pinkney and began reading his opinion.[36]

That political opinions and prejudices as between Jeffersonian Democrats and the Federalists were played upon to the utmost is clear enough from Webster's letters to need little confirmation. But such confirmation is at hand in other letters and opinions of public men of the time.[37] Little can be gained today in attempting to conceal some of these obvious facts. They are not entirely creditable if one is trying to make out a case for the Supreme Court as a tribunal raised above and beyond the ordinary pale of politics and the forces which move men in the customary walks of life. But such aloofness from politics and from other personal influences is a myth which even a slight review of American judicial history ought readily to dispel. It detracts little from the importance of the doctrine of vested rights protected on general principles or on the extension of constitutional terms to cover such principles to find that it is an important Federalist policy which the Supreme Court joins in rendering effective, the Court thus participating actively on one side of the great controversy between Federalism and the rising tide of Democracy. The fact is that from 1789 until well on to the end of Marshall's career the Supreme Court was definitely lined up with the Federalist party or point of view and was defining and expounding the Constitution according to the principles of this party. Van Buren refers to "the guarded and sly manner in which they (the Federalists) put forth the doctrines of the old Federal party without assuming the responsibility for affirming them."[38] The way in which Federalists defeated at the polls made use of the judiciary to develop under the cloak of constitutional interpretation

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[36]*The Private Correspondence of Daniel Webster*, Edited by Fletcher Webster, Boston, 1859, 267-301.

[37]See Shirley, *The Dartmouth College Causes*, 239 ff. See also Henry Cabot Lodge, *Life of Webster* (American Statesmen Series), 87 ff.

[38]*Inquiry into the Origin and Cause of Political Parties in the United States*, Edited by his sons. New York, 1867, 362.

some of the foremost principles of their party is interestingly described by Van Buren, a follower and advocate of Jeffersonian principles.[39]

The partisan point of view of Marshall while serving as Chief Justice is now well recognized by historians. "Marshall as Chief Justice was continuing his career as the expounder of the Constitution in accordance with Federalist ideas."[39a] Joseph Story said of him: "During more than half a century of public service, he maintained with inflexible integrity the same political principles with which he began."[40] "The Republicans all denounced him as a Federalist even of an extreme type. The Federalists accepted him as one of themselves, but of course considered that, as a clever-minded and honest man, he could be nothing else. His very federalism was to them proof of his impartiality and sound judgment."[41]

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[39]"It has from the beginning been the constant aim of the leading Federalists to select some department or some nook or corner in our political system and to make it the depository of power which public sentiment could not reach nor the people control. . . . The Federalist Party was conducted through the judiciary department of the government as to an ark of future safety which the Constitution placed beyond the reach of public opinion. The man who planned this retreat was John Marshall—a statesman of great power, one who partook largely of Hamilton's genius, was better acquainted with the character of the people and possessed more control over his own actions. Under a disposition the most genial, and a child-like simplicity and frankness of manner he cherished during his whole life, as all of his race have done, Federal principles and Federal prejudices of the most ultra character." See *op. cit.*, 278, 282.

[39a]F. J. Turner, "The South," 1820, XI, *Am. Hist. Rev.* 570.

[40]Story, *Miscellaneous Writings*, 682. "He was in the original sense of the word a Federalist, a Federalist of the good old school, of which Washington was the acknowledged head, and in which he lived and died. In the maintenance of the principles of that school he was ready at all times to stand forth a determined advocate and supporter. On this subject he scorned all disguises; he affected no change of opinion; he sought no shelter from reproach. He boldly, frankly and honestly avowed himself through evil report and good report, the disciple, the friend and the admirer of Washington and his political principles." *Ibid.*, 683.

Why do legal historians of the Supreme Court in the face of these facts attempt to conceal or to deny evidences of partisanship in the constitutional opinions of the Court?

The line of cleavage between the two dominant parties in American history was shown quite distinctly at the time of the death of Marshall. As Federalism lost its grip on the last stronghold, the Supreme Court, Webster, Kent, and Story indicated gloomy forebodings as to the future of the Union. Kent lamented "that everything is sinking into despotism under the disguise of democratic government."[42] With the appointment of Democrats to the Court by Jackson, Webster, and Story thought the Supreme Court ruined.[43] The Democrats, on the other hand, realized that the Supreme Court was the stronghold of Federalist ideas which in every branch of the government, had long since been discarded,[44] they knew that the Court had done more "to change the character of that instrument and to shape, as it were, a new constitution than all the other departments put together," and consequently they felt that the time had come to put this department more nearly in accord with the dominant will of the nation. The taunt of the Whigs was resented by the Democrats that the ballot box was insignificant by the side of the decisions of the Supreme Court.[45]

The author takes pains to show that appointees to the Supreme Bench no matter how active they had been in politics after appointment as justices submerged all partisan-

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[41]A. B. Magruder, *John Marshall*, 178-179. "He made Federalist law in nine cases out of ten." 180.

A representative lawyer's view on this matter is that though Marshall was a decided Federalist at the time of his appointment to the bench "we can find no more trace in any line of those great judgments that would indicate the political sentiments or bias of the Chief Justice," Phelps, address before the American Bar Asosciation 1879, *Reports*, p. 185.

[42]II, 256, 303-304, 415.

[43]II, 284.

[44]II, 280-3.

[45]*Ibid.*, 332.

ship in what is regarded as the pure judicial temper.[46] Democratic-Republicans are commended for supporting Federalist principles, and Democrats for refusing to follow all of the Jacksonian dogmas. Likewise, one of Lincoln's Republican appointees is commended for giving an opinion which placed a curb upon the extreme exercise of the President's military powers, just as the one Democrat appointed by Lincoln is given credit for helping to change the interpretation of due process in the direction of good Republican doctrines.[46a] This effort to deny the influence of partisanship in opinions by justices fails to take into account some of the underlying issues and what is conceded now to be the primary division along political lines in American history. As has been frequently observed, the division between Republicans and Democrats was largely a convenient way of naming those who were in power and those who were out of power, for American history shows no consistent policies and great political issues on which these parties steadily and persistently opposed one another. The real issue of American politics, as modern students of American history have shown, is the controversy between the agrarian, frontier, Democratic attitude and the conservative, mercantile, capitalistic attitude.[47] The democratic attitude has consistently manifested itself in the efforts to develop and establish popular control of all departments of govern-

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[46]It is admitted that in the administration of John Adams the Supreme Court was thrown into politics by a series of decisions favorable to the policies of the Federalist Party—decisions relating to Washington's neutrality policy, asserting a common law criminal jurisdiction in the federal courts, denying the right of expatriation, and upholding the constitutionality of the Alien and Sedition Laws. It was at this time that it became a common practice of the federal justices in their charges to the grand juries while on circuit to deliver political harangues exhorting the people to support Federalism and to suppress Anti-Federalism. I, 158, 165.

[46a]See opinions of Field in Slaughter House Cases, 16 Wall. 36 at 88 ff. (1873) and Barbier *v.* Connolly, 113 U. S. 27 at 31 which are eventually adopted by the majority of the court.

[47]See Beard, *Economic Interpretation of the Constitution* and *Economic Origins of Jeffersonian Democracy* for a marshalling of evidence as to the absorbing contest between the two parties.

ment through the polls, whereas the conservative and mercantilist attitude favored primarily the protection of property and contracts and was interested in other respects chiefly in placing limits upon the powers of government. The underlying principles of the conservative and capitalist point of view may be expressed under three heads; first, *a distrust of legislative power* involving a lack of confidence in the representatives selected by the voters and favoring the development of a series of limitations upon legislative bodies which would place a considerable portion of the government beyond popular control; second, *protection of the minority*, to check the rule of the majority whereby individuals and groups of individuals might be protected from the dominance of majority control; third, *protection of property rights*, to place foremost in constitutions and laws the protection of rights of property and contract.[47a] So far as possible this protection of acquired rights was to be provided for through constitutions placed beyond the control of ordinary popular majorities, but insofar as this was not done through the constitution, the conservatives favored the development of the doctrines of vested rights and implied limitations on legislative powers under which property and contracts might be protected whether the constitution made such provision or not.[48] The Federalist party, of course, favored all of the three fundamental principles of conservatism and this party as well as its successors became the champions of these doctrines. It was their incorporation through judicial interpretation into the American constitutional system that placed decided checks upon popular control not anticipated when constitutions were originally adopted.[49] And for the larger part of American history the

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[47a] *Cf.* Arthur T. Hadley, "The Constitutional Position of Property in America," *The Independent*, April 16, 1908 in which the writer concludes "The fundamental division of powers in the Constitution of the United States [as modified by judicial construction] is between the voters on one hand and the property owners on the other."

[48] See notes 21, 22, 23.

[49] "The whole American political and social system is based on industrial property right, far more completely than has ever been the

Supreme Court has been the stronghold of Federalism and conservatism.

The determining influence affecting Supreme Court decisions outside of the realm of pure law are not entirely economics as certain writers seem to indicate. Economic influences and motives are apparent at all times in the decisions of the court. At times these motives have a determining influence which greatly affects decisions. This attitude is particularly noticeable in the general policy of the Supreme Court reflecting as it did a very strong feeling of investors and property owners that land grants and titles for land acquired through public agencies should be protected at all hazards regardless of whether such grants may have been fraudulent and as to whether the government and public interests might thereby suffer severely.[50]

Though politics in the ordinary sense is often a determining influence in judicial decisions, judges frequently do not follow political inclinations in rendering their decisions. Instead of being subservent to political and economic views it is more likely that judges are influenced by conservative and traditional doctrines which have been inculcated through their training and experience. "Whilst our tribunals, or judges of whom they are composed, are swayed by

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case in any European country . . . there are certain clauses in that instrument [Constitution] which have been even more effective in securing the property holders against adverse legislation than the Convention itself intended or expected . . . clauses which were first intended to prevent sectional strife, and to protect the people of one locality against arbitrary legislation in another, became a means of strengthening vested rights as a whole against the possibilities of legislative or executive interference . . . They indirectly became a powerful means of establishing the American Courts in the position which they now enjoy as arbitrators between the legislature and the property owner . . . It is to the work of judges like Marshall and Story and Kent that the actual position of the courts under the American Constitution is mainly due." Arthur T. Hadley, *Undercurrents in American Politics*, 33 ff.

[50]See Fletcher *v.* Peck, 6 Cranch 87, Warren, I, 392-399; United States *v.* Clarke, 8 Pet. 436 and United States *v.* Arrendondo, 6 Pet. 691, II, 241-245; Mitchell *v.* United States, 9 Pet. 711, II, 262-263; also III, 71-72; also, Gustavus Myers, *History of the Supreme Court.*

the prevailing beliefs of a particular time, they are also guided by professional opinions and ways of thinking which are to a certain extent independent of and possibly opposed to the general tone of public opinion. The judges are the heads of the legal profession. They are advanced in life . . . They are for the most part persons of a conservative disposition . . . They are most likely to be biased by professional habits and feeling than by the popular sentiment of the hour."[51]

It has long been discovered that judges may be selected who are in every respect honorable and above reproach so far as personal influences and motives are concerned and that at the same time these judges, owing to their bias and traditional views, may become through those views the best agents to formulate and express doctrines favorable to property rights, vested interests and corporate privileges. It is for this reason that strong efforts have been made to secure appointments on the Supreme Court of men whose views along the lines of property and contracts are well known in advance. Another influence which has vitally affected the decisions of the Supreme Court is that of the extreme individualism developed in the West and under frontier conditions. This individualism has resulted in an over-emphasis on individual rights and liberties and has occasioned the lining up of Democratic appointees on the Court with some of the conservative members in the protection of property and vested rights. Thus Field, a Democratic appointee of Lincoln, joined with his Republican associates in extending due process so as to become a most effective restraint on state legislatures in regulating property interests and vested rights.[52] Democrats united with Republicans in extending due process so as to remove from legislative bodies and commissions established by them the final power to fix the rates and charges of public service companies. In addition to such influences, judicial decisions are frequently affected by an unfamiliarity with eco-

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[51] A. V. Dicey, *Law and Public Opinion in England*, 361, 362.

[52] See note 46a.

nomic and social conditions. The members of the Supreme Court having received their training and a large part of their experience in an earlier generation are called upon to deal with economic conditions which are radically different from those with which they are familiar. Such unfamiliarity with or lack of sympathetic consideration of economic and social conditions is apparent in the decision of the Court in *Lochner* v. *New York*,[53] which was later modified in the case of *Muller* v. *Oregon*[54] and seems again to have been followed in the recent Minimum Wage decision.[55]

The characteristics of American traditional law are conservatism, individualism and certain capitalistic or commercialistic tendencies. These characteristics have been upheld in large part by the members of our courts who through training and experience, imbibed conservative and traditional dogmas and principles. These influences have a much more direct effect upon judicial opinions than what is regarded as ordinary partisan politics. The issues involved in this conflict and the part which the Court takes in the development of a conservative and commercialistic regime has been quite generally ignored by historians of the Supreme Court.

Viewed then from the standpoint of the underlying controversies in American history and from a fair and relatively impartial consideration of those controversies in relation to the Supreme Court, the work of Mr. Warren is open to serious criticism. An author, of course, is at liberty to write as a defender or advocate, presenting opposing ideas and doctrines for the purpose of demolishing them, and, systematically aiming to give an impression of public men acting as if removed from the influences that affect men in the ordinary walks of life. From this point of view a distinct contribution has been made to American judicial history, whether one is disposed to agree or disagree with the author's bias.

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[53]198 U. S. 45 (1905).
[54]208 U. S. 412 (1908).
[55]Adv. Sh. Sup. Ct. (1922) 440.

Those who believe in the doctrine of constitutional interpretation of James Wilson, Hamilton, Marshall, Root,[56] and Roosevelt[57] namely, that as matters become national in importance, the President, Congress and the Supreme Court are expected by progressive interpretations to change the Constitution to accord the federal government power to regulate them, will, of course, agree with Mr. Warren that "the nation owes most of its strength to the determination of the judges to maintain the national supremacy" and will rejoice with him that the Court's actual decisions at critical periods have "steadily enhanced the power of the national government." On the other hand, those who believe in or are sympathetic with the Democratic point of view, or those who desire an impartial survey of American judicial history will find these volumes disappointing.

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[56]Address before Pennsylvania Society in New York, December 12, 1906: "Sooner or later constructions of the Constitution will be found to vest additional power in the national government."

[57]Address at Harrisburg, Penn., October 4, 1906; "Federal governmental power should be increased through executive action . . . and through judicial interpretation and construction of the law."

STATE INCOME AND TAXATION[1]

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The term "state income" is an ambiguous one, as it may mean either the revenues of a state or the income of all persons who are domiciled in the state. It is used in the latter sense in this paper.

Taxes are sometimes described as derivative revenue, because they are derived from the income of the taxpayers. In the last analysis they are deductions from the income of individuals. Today when there is, on the one hand, so much agitation for an increase of public expenditures for education, highways, etc., and, on the other hand, so much complaint about the weight of existing taxes, it is most essential that there should be considered what is the income of the people of the state, what proportion of this is actually taken by taxation, and how much may reasonably be taken.

The people in their sovereign capacity, through their constitutions, may or may not set limits to the taxing powers of their governments. As a matter of fact, there are limits to property taxes set in most state constitutions. But constitutional limits on, and governmental exercise of, the taxing power are simply products of political, economic, psychological, social and other factors. Some of these factors are the predominant political theory as to the scope of the functions of the state or as to how far state activity should succeed to, or interfere with, individual effort; the wealth and income of the people of the state, and those mental moods or attitudes which are called psychological. In so far as the extent of taxation is a matter of political expediency, the actual or feared reaction of the public mood is the most important factor. Wealth and income may re-

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[1]Paper read at the Fourth Annual Meeting of the Southwestern Political Science Association, Dallas, Texas, April 4, 1923.

main unchanged, yet the amount of taxes levied will vary from time to time according to the public mood. The molders of public opinion—most conspicuous of which are the newspapers—are more important in determining opinion resting on mood than on reason.

The conscious, and it may be added the willing, payment of taxes, particularly of what are called direct taxes, such as property and income taxes, presupposes a sense of duty on the part of the taxpayer to society,—a feeling of responsibility for others. This may be classed as a social factor. The growth of social consciousness has been attended by a widening scope of government functions. This has resulted in the appearance and expansion of what are called social public expenditures, such as those for education, charity and public welfare, as contrasted with the protective, such as for the police and the courts. Direct taxes have had to be more and more resorted to, and the very fact that most state taxes are direct and are therefore consciously paid is a limit on their employment, for individualism is still strong and,furthermore, the benefit theory of taxation is still the one largely held by the legislative bodies, the courts and the great majority of the people. Individualism and the benefit theory appear to go together. The benefit theory holds that not only are taxes paid for benefits received from government but that each one pays in proportion to the benefit he individually receives. While benefit is a justification for taxation, it fails theoretically and practically when erected as a sole measure of the amount of taxes a person should pay. The ability theory is the competing one to the benefit theory. According to it each one should contribute to the cost of expeditures in the common interest in proportion to his ability—measured by wealth or income. No tax system can well employ one theory to the exclusion of the other; they are both usable, theoretically and practically. Yet with the growth of social consciousness and social expenditures ability must be more and more the measure of the apportionment of taxes.

These theories, or intangible factors, are briefly reviewed

here because they are the keys to the attitude of the public towards new or additional taxation. The tangible factor is the income of the people. As income is the best measure of ability to bear taxes, what the income is of the southwestern states becomes a question of much moment.

Income of Southwestern States

The only statistics of the amount of total income by states are those prepared and published by the National Bureau of Economic Research. The staff of this Bureau includes the most eminent of American statisticians and their work in this field of state income is generally regarded as a difficult piece of work ably done. The Bureau made its estimates of income received for the year 1919, and the principal source of material used was the analysis of the returns for the Federal income tax of 1919 published by the Federal Government. Only within the past few months has the analysis of the returns for 1920 been published, so that that for 1919 was the most recent one available. The Bureau's statisticians added to the amount of income reported for the Federal income tax estimates of the rent of homes owned by their occupants, of the amount of tax exempt income, and of income unreported.

As ascertained by the Bureau the income of Texas in 1919 was $2,511,050,000; that of Oklahoma, $1,083,851,000; that of Louisiana, $771,414,000; and that of Arkansas, $663,742,000.

Included in these amounts is estimated rental value of homes owned by occupants of

$23,170,000 for Texas,
7,952,000 for Louisiana,
5,684,000 for Oklahoma, and
1,790,000 for Arkansas.

A separation was made of farmers' and non-farmers' incomes. This is of interest as it has a bearing on the practicability of a state income tax in a given state. The es-

timate of the income of the farmers of Texas was $885,-122,000, or 31% of total state income; that of farmers of Oklahoma was $427,608,000, or 39% of total income; that of Louisiana was $144,844,000 or 18% of total state income; and that of Arkansas was $270,319,000, or 40% of total state income.

Proportion of Income and Taxes

The National Industrial Conference Board upon the basis of the above statistics of state income made an investigation of the proportion of state income taken by Federal, state, and local taxes. It found that Federal taxes collected in each state and each state's share of other Federal taxes and miscellaneous licenses were in 1919 as follows:

Texas	$126,990,000 or 5 % of state income
Louisiana	61,654,000 or 8 % of state income
Oklahoma	48,310,000 or 4.4% of state income
Arkansas	5,551,000 or 5 % of state income

Taxes for state purposes were in 1919 as follows:

Texas	$23,143,000 or 0.9 % of state income
Louisiana	6,963,000 or 0.9 % of state income
Oklahoma	8,526,000 or 0.78% of state income
Arkansas	5,551,000 or 0.83% of state income

The Conference Board was unable to obtain the actual amounts of taxes collected for local purposes, but it used all available data and made probably as accurate an estimate as was possible. The estimates are as follows:

Texas	$43,643,000 or 1.7 % of state income
Louisiana	29,468,000 or 3.8 % of state income
Oklahoma	34,724,000 or 3.22% of state income
Arkansas	15,428,000 or 2.37% of State income

State and local taxation together took 2.6% of state income in Texas; 4.7% in Lousiana; 4% in Oklahoma, and 3.2% in Arkansas. The huge drain upon state income by

Federal taxes, as compared with state and local taxes, is one outstanding feature of these statistics. The result of these large Federal levies is to cause a resistance by taxpayers to state and local developments. The average taxpayer feels impotent when it comes to influencing the Federal Government, but he can bring pressure to bear on his local councilmen and on his representative in the state legislature.

Of the forty-eight states Texas and Alabama showed the lowest percentage of state income taken by total taxes; namely, 7.6%. Only two states were lower than Texas in the percent of income taken by state and local taxes, and these were Alabama and South Carolina, each with 2.4%. The average of the ratios of state and local taxes to state income of the Pacific Coast States was 5.2%. The average of Michigan, Minnesota, Wisconsin, Iowa, Kansas and Nebraska was 5.8%. Texas and the other southwestern states have a lower average than these two groups of states. But it may be said that these two groups of states have a more homogeneous population than have the southwestern states, because some of these latter states have large negro and Mexican elements. The lack of homogeneity in population is no doubt partly responsible for the lower ratio, but even with that the average of the four southwestern states was below the average ratio of the fourteen southern and southwestern states which was 3.5%, while Texas with a ratio of 2.6% was considerably below the average of her sister southern states. The presence therefore of a large negro and Mexican population does not wholly explain the low ratio of Texas. Those who should advocate increased taxation by southern and southwestern states to the average of the northern and western states would not be justified, because there is probably a less uneven distribution of wealth in the states with the more homogeneous population. While negroes and Mexicans swell the state income, yet when it comes to taxation of property or of income they have none, with the result that taxes are concentrated on a

smaller percent of the population than is the case in the north-central and Pacific states.

The above statistics relate to income and taxation in the year 1919. That was a prosperous year measured by prices, employment and business activity. In May, 1920, there occurred a business crisis and for a considerable period thereafter was business depression, with a resulting decline of incomes, especially farmers' incomes. Taxes, however, have declined little, if any, so that the percentage of income taken by taxes increased. The National Industrial Conference Board estimated that for the nation the ratio for the year 1921 was 16.7% of the national income. The Board did not make an estimate by states. As the average for the nation in 1919 was 12.1%, the average for 1921 represented an increase of 38% during the two years. Assuming that this increase applied to Texas, Federal, state and local taxes took about 10.5% of state income in 1921, of which 3.58% was for state and local purposes.

It is pertinent to inquire next as to how much of income may be taken by taxation without exciting taxpayers to rebellion. There are no accepted tests for this. In Europe heavy taxation has long been the rule, but a proportion accepted there would not be tolerated here. In the older American states the proportion would be higher than in the newer. The intangible factors play an important role in accounting for the differences. Leroy-Beaulieu, the late eminent French economist, said a number of years ago that 15% of income taken by taxation was high, 6% was low, and 9% or 10% was moderate. But he had in mind no doubt European or French standards. I somewhat hesitatingly venture the opinion that in the United States 10% of income taken by taxation would under normal conditions be considered high, except in the case of very large incomes, and that 5% or 6% would be considered moderate. There is, has been, and probably always will be some lack of cheerfulness in paying taxes. A government would starve on voluntary contributions, so compulsion of payment is a necessary attribute of a tax. Much of the complaint of

taxpayers, however, is due not so much to an unwillingness to do their duty as citizens as to their belief that administrative officers are inefficient or wasteful or corrupt.

Situation in Texas

The situation in Texas is that the proportion of total income taken by state and local taxation is not only not excessive, but, judged by what is the case with nearly all the other states, is somewhat below a reasonable ratio. Complaint of excessive taxation in Texas for state and local purposes does not seem to be justified; complain, however, is justified of the kinds and operation of the taxes employed for state and local purposes. The Texas system is inequitable and financially inadequate. The vice is in the kinds of taxes employed and their administration. There are people in the state, however, who believe that the whole trouble is not with the tax system but is with the spending agencies. For these people greater economy, a reduction in public expenditures, and a lowering of taxes are the solution. More efficient administration of existing taxes would undoubtedly help some, but some of the taxes should be changed, and then, too, when one looks over Texas and sees what remains to be done to make her towns, cities and country and her population more what they should be, a reduction of public expenditures seems to be out of the question. Less of state income should go to the Federal Government and more to state and local governments.

General Property Tax

Returning to the proposition that there is not an excessive amount of state income taken in Texas for state and local purposes, but that what is taken is done so in an inequitable manner, and hence is causing discontent, the outstanding offender is the general property tax. In its operation this tax is characterized by non-rendition of property and gross undervaluation. Data exist on the escape of property for only a few items, and these are mainly agricultural. According to the United States Census there were

in Texas on January 1, 1920, 1,992,001 horses, mules, asses and burros; there were assessed for taxation, as of the same date, according to the Report of the Comptroller of the State of Texas, 1,673,732. The Census found 6,362,799 cattle, assessors found only 5,562,648; the Census found 2,367,185 hogs, assessors found only 899,389. The farmers are not the only ones who do not list all of their property, however, and even with that the general property tax falls on them more heavily than on any other class, for they have most of the property which the tax, as administered, succeeds in reaching. The most flagrant evasion is that of money on hand and on deposit for which the urban class is mainly responsible. The total assessment of money on hand and on deposit in 1919 was $46,741,674, but the state and national banks had on deposit on December 31, 1918, or the day before the date on which assessment was based, $389,265,000. Not all of this amount was on deposit on January 1, 1919, nor was all of that which was on deposit assessable in Texas. If we assume that two-thirds, or $250,000,000 was the taxable amount, the amount rendered was only 18% of the amount taxable. The percentage was really lower than this, because we take no account of the money outside of the banks. The attempts to tax money and credits by a high rate property tax has everywhere been a failure and has been abandoned and other methods substituted in the more progressive states in tax matters.

The facts as to undervaluation are more numerous and incontrovertible. The value of farm lands and buildings according to the Census was on January 1, 1920, in Texas, $3,700,173,319. The assessed value of all acreage land, with improvements, was for the same date $1,333,447,653, or 36% of the Census figure. The total value of livestock on farms on January 1, 1920, was, according to the Census, $575,063,030; the assessed value of all livestock—both on and off farms, was for he same date $229,291,416. Here again we are forced to cite examples from agriculture, but it is not to be assumed that the farmer is any worse in this respect than the town and city dweller.

Not only is there undervaluation, but the degree of it varies from county to county. Undervaluation is in itself not an evil; it is so only when it is not uniform. The Texas State Tax Commissioner in his report for 1920 compared valuations in twenty-three counties. He found that farm land was assessed at from 15% to 40% of true value; city property at from 25% to 50%; bank stock at from 50% to 75%, and personal property at from 25% to 75%.

In 1919 eleven of the states reported 100% valuation of real property in practice as well as in law. The reported basis for Texas was 50%, though the law contemplates 100%. Undervaluation has so long been practiced in Texas that a 100% basis would be unwise. Tax rates and debts have been adjusted to undervaluation. There are those in this state who believe that the average of undervaluation is under 40%, instead of 50%, and it has been proposed by them that undervaluation should be stabilized at 40% and made uniform throughout the state. Suppose valuations had been stabilized at 40% in 1920, what would have been the financial results? Taking the Census valuation of farm lands and buildings as their true value,—for this is the only definite estimate of true value which has been made even though it may not be perfect, 40% of it would have added $46,621,000 to the assessment rolls. Assuming that by and large the other assessed property, which amounted to $2,033,899,256, was assessed on a 50% basis (and this is the average of the undervaluations cited by the Texas State Tax Commissioner in his report for 1920), 40% of its true value would have resulted in a decrease of $407,187,316. Even with the state rate of 62 cents on the $100 valuation, there would have been a decrease in revenue of $2,235,000. From this it may be concluded that 40% valuation is no way to finance the state government. Advocates of it, however, assume that it would bring much more property on the tax rolls, but that this would be the case with intangible personal property is very doubtful.

Suppose undervaluation had been stabilized at 60%. Twenty-seven states in 1919 had 60% or above as their

basis. $886,656,338 would have been added to the assessed value of acreage property and $416,168,654 to other property assessments—a total increase of $1,302,824,000. With a tax rate of 62 cents the increase in revenue would have been $8,077,508. But in 1919 only six of the twenty-seven states had a state tax rate of as much as 62 cents. We cannot assume that 60% valuation would be accompanied either by a 62 cents rate or that renditions of personal property would hold up to their former figures. Still a 60% valuation with other modifications of the property tax would increase the revenues by at least $5,000,000.

A tax commission with the powers of equalizing the state assessment, of assessing public utilities and of supervising the work of county assessors is absolutely necessary to the future of the property tax as a state tax. Of the 48 states 41 in 1922 had a commission or a commissioner with supervisory power over local taxing officials, and there were only five states, of which number Texas was one, which had neither state equalization nor state supervision over assessments for state purposes.

Income Tax

State equalization of assessed values would not cure, however, all of the evils in the operation of the general property tax. It would not affect the escape of personal property, especially intangible personalty. The property tax is becoming every year more and more of a tax on real property, so that we are unwittingly drifting to a sort of single tax. This is most unjust to owners of real property, and is certainly a discouragement to home owning. Tax ability which is represented by personal property and by incomes whose recipients have little, if any property, to be reached by the property tax get off very lightly under the present system. A personal income tax is the best way of reaching such tax ability. Eleven states had the personal income tax in 1922. Southern and southwestern states which had it were Mississippi, Missouri, Oklahoma, North Carolina, South Carolina, and Virginia. It was most suc-

cessful in Missouri, North Carolina, and Virginia. Other states having it were Wisconsin, New York, Massachusetts, North Dakota and Delaware. Its most notable success has been in Wisconsin, New York and Massachusetts, where there is centralized administration of it. If such a tax were adopted by Texas and its administration left to locally elected officers, it would be as big a farce as is the present tax on intangible personal property. The personal income tax should be designed to reach those who are not reached by the property tax. It should not be a tax added to the present tax system, but should be of the nature of a lieu tax. Thus in Wisconsin money, credits, most stocks and bonds, farm machinery, tools, household furniture, wearing apparel and personal ornaments are exempted from property taxation. This exemption applies not only to state but also to local property taxation. In Wisconsin, New York, and Massachusetts the yield of the tax is distributed between the state and the local governments. With exemptions the same as those of the Federal income tax the farming class would be practically eliminated from liability to the tax, and this could not be complained of, because farmers would be sufficiently taxed under a well administered property tax. If Texas had had in 1919 a personal income tax based on the Wisconsin model, it would have produced, without the personal property tax offset which is allowed by the Wisconsin tax, about $8,000,000. The personal property tax offset is excluded in our estimate, because Wisconsin and North Dakota are the only states which have that provision, and it has been so criticized in Wisconsin that it will probably be abolished. Of course the estimated $8,000,000 from the tax would not have been a net addition to the revenues of the state, as there would have been some property tax lost by reason of the tax being a lieu tax, and if the yield had been distributed between the state, the counties and the towns and cities the addition to state revenue would not have been anything like $8,000,000. A net addition of $1,000,000 to state revenue would probably be a liberal estimate. Missouri has a personal income tax

which is not a lieu tax and whose yield is not distributed, and if Texas had had in 1919 a tax on the Missouri model, the yield would probably have been over $3,500,000. But the Missouri tax is not as good an example to follow as is the Wisconsin tax.

Other Taxes

I shall not take up the taxation of business, or of natural resources like oil, sulphur, coal and other mineral products, because these do not need the overhauling which the property tax requires. The only mineral product from which any considerable revenue may be derived is oil. Texas has had for some years a gross receipts tax on oil production of 1½%, and it produced in 1920 $3,018,432; in 1921, $3,568,974 and in 1922, $2,441,731. An increase in this tax was proposed in the last regular session of the Legislature, but it failed because of disagreement between the House and the Senate. If the tax were increased to 2%, the estimated revenue from it is $5,000,000; if the rate were made 3%, the receipts would be over $6,000,000. Some increase is warranted, for the industry is a peculiarly fit one for heavy taxation.

The Texas inheritance tax is one of collateral heirs and strangers to the blood. Texas and Maryland were in 1922 the only two states of the 46 states which had the inheritance tax which did not apply it to direct heirs. The Federal estate tax in Texas in 1922 amounted to $1,287,905, while the Texas inheritance tax brought in only $162,226. Texas could not levy an inheritance tax which would be as productive as the Federal tax, because the two taxes together would be confiscatory. Here is a clear example of where Federal taxation is depriving the state of a proper and needed source of revenue.

There is a well observed tendency on the part of the states to enter the field of consumption taxes. These are sometimes called luxury taxes. The taxes on gasoline and amusements are examples. A tax on gasoline to be paid by wholesalers was enacted at the past regular session of the Legis-

lature. Something like $2,800,000 is expected from it. The Federal tax on admission to places of amusement produced in Texas in 1922, $2,024,873. A state tax of equal amount, and collected in the same manner, should bring in an equal amount. Such a tax would not be an unjust one, for expenditures on amusements represent a taxable surplus which would in the case of many of its possessors not otherwise be reached by taxation.

Conclusion

In conclusion, a summary of the points I have sought to make is as follows: Texas is a state with a large state income; state and local taxation do not take an excessive amount of this income, but the existing methods of state and local taxation are unjust and fall excessively on certain classes; Federal taxes are a great drain on state income and are at present prejudicial to state and local developments; a reform of the state and local systems would not only be an act of justice but it would be productive of fairly large additional revenue.

FINANCING HIGHWAYS IN TEXAS[1]

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The sources of funds for constructing highways have been three; County, State, and Federal. From 1917—1922, counties voted $116,383,529.90 of road bonds. During those five years, the State contributed through the State Highway Commission, $10,902,137.20, and the Federal government awarded to Texas $26,934,094.02 in cash, and $4,430,732.51 of war material. While State aid was the least of these items, the Federal aid was administered by the State Highway Commission, and many of the County bonds were inspired or advised by that Department.

Kinds of Traffic

Roads are for three kinds of traffic: (1) strictly local, or neighborhood and within the county: (2) intra-state, but passing out of the county of its origin; (3) inter-state.

The County has borne, and should bear a substantial part of the burden of highway construction. There must be roads between different communities within the county. Any road that is a link in a connected system of State or National highways, will serve certain portions of the citizenship of each county it crosses as a local road. The better such a road, the more satisfactory it will be to those who use it locally. The county certainly should contribute toward the construction at least what it would cost to build the same number of miles after the manner of other good county roads. Moreover, since a designated State Highway would be a great convenience to people in a community

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[1]Paper read at the Fourth Annual Meeting of the Southwestern Political Science Association, Dallas, Texas, April 4, 1923.

This paper is based upon the reports and publications of the State Highway Commission, and upon information furnished by the State Highway Engineer, and by the editor of the *Texas Highway Bulletin*.

where they would want to go beyond their county, they, in equity, may be called upon to contribute more than the cost of the best road they can afford for local purposes.

But a county should not be expected to build unaided a portion of a State Highway. Such a highway is for the accommodation of those who travel longer distances. In fact, most of the traffic upon such highways is inter-county. This causes the traffic to be much heavier than along purely county roads, and calls for a better type of construction. What the State contributes should be added to the funds supplied by the county, in order to make possible a permanent road. The portion of the total cost of construction which the State should bear, may be pretty well standardized. However, occasionally it will be advisable for a State Highway to cross the poorest and most sparsely settled portion of a county, or to go through a county so sparsely settled as not to be able to build good roads. In such a case, the State would have to bear a larger share of the burden of construction.

Much traffic is interstate. The Federal government is, therefore, justified in encouraging the construction of a national system of highways. Its present program calls for roads connecting the States and chief cities of the Union. This system of roads is designed to accommodate those desiring to go from one state to another. If people of other states constantly drive over Texas' highways, for example, it is entirely proper for them to contribute to the construction of such roads. The wisdom of Federal aid to encourage building interstate highways was early recognized, and resulted in the old Cumberland road. After such a policy of internal improvements was thought to be unauthorized under the Constitution, the Federal government indirectly aided railroad building by granting land to states with the understanding that the states would use the land as gifts to encourage the construction of railroads.

With the development and wide use of the automobile, the Federal Government is again turning to the policy of aiding in and encouraging the building of interstate highways. The appropriations have been as follows:

1916	$75,000,000.00	
1919	200,000,000.00	
1921	75,000,000.00	
1922	50,000,000.00	for 1923
	65,000,000.00	for 1924
	75,000,000.00	for 1925
Total appropriated to date	$540,000,000.00	

Of the total, five hundred and forty million dollars, Texas has been allotted about $32,000,000.00

Need of State and Federal Aid

There is great need of State and Federal aid in financing highways that will constitute a connected system. Such aid is made necessary, first, because of the increasing volume of traffic over such roads. In 1917, there were registered in the State approximately 15,000 motor trucks, and at the present time, from the best estimates available, there are approximately 50,000 motor trucks in the State. In the absence of exact figures as to the total number of trucks which are operated in the State, the following is of interest:

Smith County reports that truck traffic has increased 100% since their highways were improved four years ago. Four large grocery houses are now handling 60% of their outgoing freight in trucks. Another large wholesale firm handles 65% of their outgoing freight in trucks, and also uses trucks to deliver to customers, because it is faster, they say, than by railroad. Harris County reports that each day there pass over the LaPorte road 88 heavy trucks and 99 light ones; over the Galveston road, 44 heavy trucks, 77 light ones; over the Almeda road 24 heavy trucks and 40 light ones. El Paso County reports that trucks maintain regular service from their city over several roads into both Texas and New Mexico. Wichita County reports that each day about 157 trucks pass over the road between Wichita Falls and Iowa Park. On the Dallas-Fort Worth road an actual count on August 26, 1922, showed: heavy loaded trucks, 93; trailers loaded, 13; heavy trucks empty, 38,

trailers empty, 9; light trucks loaded, 137, trailers loaded 1; light trucks empty, 182, trailers empty, 3; on that date the total traffic showed 4,088 vehicles, of which all but 35 were motor vehicles. Traffic by motor will, no doubt, continue to increase with the extension and improvement of the roads.

In Connecticut it was found that one highway carried during the year various commodities worth $15,000,000, of which 14% were agricultural products; manufacturing 73%; 13% miscellaneous commodities. These goods were light weight, and relatively high priced. The United States Department of Agriculture reports that as a result of the use of trucks, the length of the farmers' haul has increased from 7 to 17½ miles. The use of motor vehicles demands a more expensive type of construction than would otherwise be necessary in road building.

The use of motor vehicles also increases the cost of maintaining highways. A few years ago, bonds were voted for building gravelled and iron ore roads, with the expectation that they would accommodate farm traffic and a reasonable amount of auto traffic, and that with small outlay for maintenance they would last a generation. The bonds were usually issued for a period of 25 or 30 years. Great increase in the use of heavy motor vehicles has damaged, and in a number of cases, practically destroyed in a short time many miles of such roads.

In the second place, it is necessary for the State and Federal Government to aid in the construction of State Highways, because it is impracticable in many cases for a county to finance such a highway. The average agricultural county could provide fair roads for the use of its own citizens, but to build a permanent road across the county that would carry the heavy traffic of a State highway, would require such an outlay as to be unduly burdensome to the property holders of the county. The outlay would be out of proportion to the service the road would yield to the citizens of the county.

In response to this need for aid in constructing highways

beyond the means available in the average county, the people of Texas have, within the past six years, been rather active. In 1916, Congress passed the first Federal Aid Act for highways. As a result of this legislation, there has been activity within different states. The Legislature of Texas complied with the requirements of the act, and created the "Texas Highway Commission," which has operated largely by using county funds to match Federal aid.

In 1921, Congress enacted a law requiring that all Federal aid shall be matched 50-50 with State funds. This makes necessary finding means to supply the State with such funds.

Let us turn now to what has been accomplished in Texas. Table I shows the mileage constructed and cost thereof, and the Federal and State aid contributed toward meeting such costs, down to December 1, 1922:

TABLE I

Texas State and Federal Aid Projects—To December 1, 1922

Exhibit	Mileage	Total Costs	Federal Aid	State Aid
Projects completed prior to Dec. 1, 1920	976.59	$ 5,326,327.55	$ 1,308,542.66	$ 904,252.49
1. Projects completed Dec. 1, 1920 to Dec. 1, 1922	2,087.63	28,812,980.36	9,458,345.86	4,326,800.85
2. Projects under construction	1,888.37	26,563,931.16	9,322,282.44	3,774,479.23
3. Additional projects financed and plans being prepared	1,291.82	14,251,182.03	6,193,055.06	1,003,060.33
4. Total active projects	6,244.41	$ 74,954,421.10	$ 26,282,226.02	$10,008,592.90

Summary of Projects as of December 1, 1920
Showing Type and Mileage of Each

Type	Completed	Under Construction	Additional Projects Plans Being Prepared
1. Miles concrete pavement	7.1	100.3	47.8
2. Miles bituminous pavement	173.94	410.6	313.7
3. Miles crushed stone or gravel	516.06	1,159.0	581.7
4. Miles sand clay or shell	169.93	77.6	70.6
5. Miles grading and bridge	109.56	291.9	52.2
Total Mileage	976.59	2,039.4	1,066.0
Number of bridge projects	5	6	12

Summary of Projects for Period December 1, 1920 to December 1, 1922
Showing Type and Mileage of Each

Type	Completed	Under Construction	Additional Projects Plans Being Prepared
1. Miles concrete pavement	184.36	45.79	43.04
2. Miles brick pavement	1.50	18.71	----
3. Miles bituminous and surface treated	240.60	698.11	215.13
4. Miles crushed stone and gravel	1,393.45	942.63	610.12
5. Miles sand, clay, caliche and shell	201.48	58.73	113.38
6. Miles grading and bridges	66.24	124.40	310.15
Total mileage	2,087.63	1,888.37	1,291.82
Number of bridge projects	15	16	11

We can better appreciate the significance of the work done under the supervision of the State Highway Commission, if we divide the State and show totals for each division. These divisions are arbitrary, but I think that the results are enlightening. We will designate as Division (1), or East Texas, all those counties east of a line drawn through the West boundary of Matagorda County north to Red River, between Grayson and Cooke Counties.

Let us draw another line from the Rio Grande River, at the corner of Dimmitt and Maverick Counties, north to the Oklahoma boundary, between Hardeman and Childress counties; the group of counties between these lines, let us

call "Central Texas." By drawing a line East from the corner of Tom Green, Concho and Menard Counties to the corner of Milam and Robertson Counties on the Falls County line, we will divide Central Texas into "North Central and South Central," which we designate as divisions (2) and (3). All West of Central Texas we may designate as "West Texas," and by drawing a line West from the corner of Taylor and Runnels Counties to the New Mexico boundary, we will divide West Texas into "Northwest and Southwest Texas," which we may call divisions (4) and (5).

Let us notice now the miles of roads in the State according to the divisions of Texas described.

Miles of Road in Texas

1. East	51,140
2. North-central	39,412
3. South-central	28,364
4. Northwestern	15,252
5. Southwestern	7,423
Total for state	141,991

Miles Designated as State Highways

1. East	5,706
2. North-central	3,470
3. South-central	3,646
4. Northwestern	2,569
5. Southwestern	2,255
Total for state	17,646

Miles Completed

1. East	1,226
2. North-central	555
3. South-central	613
4. Northwestern	300
5. Southwestern	214
Total for state	2,908

Miles Under Construction

1. East	664
2. North-central	435
3. South-central	595
4. Northwestern	102
5. Southwestern	235
Total for state	2,031

Additional Miles Financed

1. East	386
2. North-central	123
3. South-central	328
4. Northwestern	53
5. Southwestern	256
Total for state	1,146

It is interesting to note the amount expended upon bridges in the different divisions in the state:

Steel Bridges

1. East	$ 932,600.00
2. North-central	71,535.00
3. South-central	294,044.00
4. Northwestern	50,000.00
5. Southwestern	131,000.00
Total for state	$1,479,179.00

Concrete Bridges

1. East	$ 310,150.00
2. North-central	328,050.00
3. South-central	107,900.00
4. Northwestern	123,800.00
5. Southwestern	.....
Total for state	$ 869,900.00

The revenue for the above construction is shown in the following tables according to each division of the state:

Bonds Voted by Counties from 1917 to 1922, Inclusive

1. East	$ 60,320,499.90
2. North-central	30,362,000.00
3. South-central	18,334,000.00
4. Northwestern	3,522,030.00
5. Southwestern	3,845,000.00
Total for state	$116,383,529.90

State Aid Apportioned To

1. East	$ 4,422,169.72
2. North-central	2,200,964.79
3. South-central	2,042,525.67
4. Northwestern	585,590.95
5. Southwestern	1,650,882.38
Total for state	$10,902,133.51

Federal Aid Apportioned To

1. East	$11,888,863.72
2. North-central	5,221,511.67
3. South-central	7,063,807.78
4. Northwestern	887,233.61
5. Southwestern	1,872,677.24
Total for state	$26,934,094.02

The following shows the particular source of revenue for state aid and also the funds available to counties for maintenance of designated state highways:

Amount of Registration Fees Received by the State Highway Department from 1917-1922, Inclusive, i.e., since its establishment (A like amount was received by the counties)

1. East	$ 3,569,767.90
2. North-central	2,279,302.13
3. South-central	1,395,600.77
4. Northwestern	702,833.78
5. Southwestern	421,048.15
Total for state	$ 8,368,552.73

Value of surplus war material leased for road building

and maintenance purposes over amount paid by counties:

1. East	$ 1,411,652.62
2. North-central	1,287,663.58
3. South-central	942,063.63
4. Northwestern	462,603.93
5. Southwestern	326,748.75
	$4,430,732.51[2]

It is proposed to build in Texas a state highway system, that is, a system of connected highways of about 18,000 miles. A map prepared by the State Highway Commission shows the location of these designated highways, those under construction, those to which aid has been allotted, and the mileage completed.

The Seven Per Cent System

A part of the State Highway System may receive federal aid if Texas complies with the requirements imposed by Congress. Assuming that the people of Texas will decide to meet these requirements, about two-thirds of the designated highways will then receive federal aid, for—according to the federal statute—the state must expend federal aid upon roads constituting not more than 7 per cent of the total mileage of the state. Three-sevenths of this 7 per cent must constitute a part of an interstate system of state highways and four-sevenths of this 7 per cent may be secondary, that is, purely intrastate roads. The federal government will assume no jurisdiction over these highways, so long as the state builds them as a part of a connected system and provides proper maintenance.

Let us now turn to what is proposed in the way of highway construction, considering the cost of carrying out the program. The State Highway Commission has designated as "state highways," 17,500 miles of roads; 3,064 miles have been completed, leaving yet to be constructed, 14,436 miles.

[2]Statistics compiled from First, Second and Third Biennial Reports of the State Highway Commission for the years 1918 to 1922, inclusive; and from *Texas Highway Bulletin*, January, 1923.

The 7 per cent system of state highways upon which federal aid may be expended, constitutes 11,284 miles, of which 3,064 miles have been completed, leaving 8,221 miles yet to be constructed.

Cost of System

Now let us consider what the cost will be of this construction.

In building 3,064 miles already completed, the cost of construction has averaged about $15,000 per mile. At the same cost of construction, building no better roads than what we have, it will require $217,000,000 to complete the designated highways.

The federal government may be called upon to pay one-half the cost of constructing the 11,285 miles that constitute the 7 per cent on which federal aid may be expended, 3,064 miles having been completed, one-half of building 8,221 miles at $15,000 per mile is $62,000,000. The 6,315 miles not in the 7 per cent system would have to be financed entirely by the state and counties, and at $15,000 per mile would cost $95,000,000, making a total of $157,000,000 which the state and counties will have to supply if our system of highways is finished as it has been begun. Thus far, the counties have contributed $18,200,000 in cash toward the building of state highways. This does not include the cost of right of way and preliminary work by the counties before construction work was begun.

It is to be expected that the state will have to find the means of raising a large proportion of this $157,000,000. If we should set as our goal the mere completion of the 7 per cent system, the 8,221 miles yet to be constructed, it would cost at an average of $15,000 per mile, $124,000,000, and the state's share of that amount, assuming the federal aid, would be $62,000,000.

Cost of Complete System of Highways

Let us consider the expense of building a first class system of roads in Texas, which would involve the improvement of every highway in the state, and the building of 17,500 miles of permanent roads.

In order to get the best possible roads, it will be necessary to spend the $40,000 per mile possible under the federal statute, the federal government contributing $20,000 That would give the state 11,285 miles of road at $40,000 per mile.

This program would call for $20,000 per mile from the state, for 17,500 miles, making a total of $350,000,000 for the state. The counties might be called upon to bear one-half of that expense, that is, $175,000,000, leaving then $175,000,000 as the total for the state to raise, provided it is arranged for all the funds to be turned over to the State Highway Commission. If all the mileage were fairly well improved, it would cost the counties over one billion dollars. That is, assuming the construction would call for about $8,000 per mile. But the counties could likely get along on the improvement of one-fourth of the total mileage. If so, that would represent an outlay of about $250,000,000. The remainder of the roads could be graded for about $400 per mile, that is for about $42,000,000. That is to say, if the counties could raise a sum aggregating 300 million dollars, they could grade every road in the state and could build gravelled or iron ore roads to an amount equaling one-fourth of the total mileage.

The cost of grading varies; in some cases it costs $300 to $400 per mile, in other cases where lands are mountainous or swampy, it costs $15,000 per mile, including bridges and culverts, but on an average, perhaps the grading can be done throughout the entire state for $400 per mile. The cost of construction also varies from one community to another. In Mason County, where the soil is disintegrated granite, a road was completed two years ago at a cost of $2,000 per mile. Though there has been heavy traffic on it, it is still

in good condition. In Hays County, which has disintegrated limestone, a graveled road was built for $2,500 per mile, that compares favorably with any first class gravelled road. On the other hand, a gravelled road in Delta County cost $25,000 per mile, the gravel having to be shipped into the county. In most parts of the state where gravel beds are located, good gravelled roads can be built from $6,000 to $12,000 per mile. If we take an average of $10,000 per mile for the entire state, perhaps that would cover the cost of gravelled roads.

The maintenance of roads has been neglected in the past, but if we are to have a permanent system of roads, careful attention must be given to maintenance in the future. From the estimates that have been obtained from county engineers and from careful comparisons with similar work in the Eastern States, it appears that a reasonable cost for maintaining a dirt road and dragging it varies from $125 to $150 per mile per year. That would mean a cost to the counties of the state on 100,000 miles of dirt road of $10,000,000 per annum.

The cost of maintaining gravelled roads while varying widely, would perhaps be for the entire state about $400 per mile. That would mean for about 30,000 miles of gravelled road, an annual outlay of $12,000,000 for maintenance. The average life of a gravelled road is from 6 to 10 years. If we could assume that on an average, a gravelled road would last 6 or 8 years, a replacement fund of about $43,000,000 per annum would be required. The total charges for upkeep and replacement of all county roads would approximate something like $63,000,000 per year.

The cost to the state of maintaining its designated system of highways would likely be at least $200 a mile per annum, that is to say, not less than three to five million dollars per year after the entire system has been built.

Sources of Revenue

The present sources of revenue to meet the expenses of road building which will fall somewhere between the mini-

mum and maximum hereofore set out are: (1) such funds as counties may raise; (2) state appropriations; (3) federal appropriations. We know pretty well what to expect from the federal government, that is a maximum of $20,000 per mile on a 50-50 basis until the 7 per cent system is completed. As for state appropriations, under the law as amended by the last legislature, it is estimated that registration fees on motor vehicles and a few minor sources, such as chauffeur badges and duplicate sales, will yield about $8,500,000 per year, of which, about $6,000,000 will be paid into the state treasury, and credited to the state highway.

A tax of one cent per gallon on gasoline sold for consumption in Texas will yield to the state highway fund an amount which is estimated from $750,000 to $1,800,000.

DIVISION OF LATIN-AMERICAN AFFAIRS

EDITED BY IRVIN STEWART

University of Texas

THE PAN-AMERICAN POLICY OF THE HARDING ADMINISTRATION

GRAHAM H. STUART

University of Wisconsin

The first half of President Harding's term of office has now been completed and the political book-keepers are submitting their reports to the American public. As might be expected the debit and credit sides of the ledger conform very closely to the political affiliation of the accountants employed. But in every case more attention seems to be devoted to the items under the head of foreign policy than to those under the title of domestic affairs. This is the more surprising when we remember that the foundation and superstructure of the Republican platform was based upon a return to the consideration of American problems, and a let-up in the attempt to help Europe put her house in order. Reduction in taxes, economy in administration, aid to the farmer, and the establishment of a merchant marine seemed to be far more important steps in the return to normalcy than the question of an association of nations or the settlement of the allied debts. The only question of foreign affairs which the Republicans seemed determined and eager to settle was the ratification of a treaty with Germany, which should free us once and for all from the baneful influences and effects of the dangerous treaty of Versailles.

Hardly, however, had President Harding called a special session of congress to consider the financial problems of the country, when Senator Borah introduced a resolution which clearly showed that domestic financial problems were inseparately bound up with world affairs. If the administration wanted to economize, the naval appropriation bill offered an excellent opportunity to begin. But even Senator Borah would not have us disarm alone, so he gave the

administration an opportunity to give practical evidence of its desire to economize, by adding his "naval holiday" amendment to the navy appropriation bill.

The results of the Washington conference for the limitation of armament which followed from this modest beginning have so far transcended all other accomplishments of the Harding administration up to date, that it is not surprising that in striking the balance special emphasis should be given to this item. Nor can too much credit be accorded Secretary Hughes for his wisdom in picking the proper subjects to be discussed and then limiting the discussion to the agenda. However, so much attention has been given to this brilliant beginning of what seemed to be a constructive American policy of co-operation and participation in world affairs that the apparent failure to follow it up in a whole-hearted fashion has rather left the impression of an anti-climax. But more regrettable still is the fact that our interest in the European situation and our failure to do much to relieve it has taken our attention away from the very substantial accomplishments of the Harding administration in its treatment of Latin-American affairs. Loath as Uncle Sam has been to accept the urgent invitations of his European cousins to join in family councils, he has exhibited a most genial and friendly attitude towards all opportunities of getting together with his brothers and sisters of Latin-America. If the best construction possible be given to the apparently unsteady European policy of the Harding administration that it is one of *reculer pour mieux sauter*, on the other hand no excuses whatever are necessary to defend the straightforward, well considered policy of the United States in regard to Latin-America.

Almost immediately following his inauguration President Harding indicated in no uncertain manner that he desired an early settlement with Colombia for what was regarded by the people of Latin-America as "the only real injustice committed by the United States against Latin-American people." During the Wilson administration a treaty indemnifying Colombia to the extent of $25,000,000 for the

loss of Panama had failed of ratification, primarily due to the opposition of those who had supported both Roosevelt and his policies. But when President Harding in a message to the Senate dated March 9, 1921, suggested that "the early and favorable consideration of this treaty would be very helpful at the present time in promoting our friendly relationships,"[1] and when Senator Lodge, chairman of the committee on foreign relations, not only spoke in favor of ratification, but declared that Colonel Roosevelt before his death had also signified his approval of making a settlement, the treaty was approved by a vote of 69 to 19. Ratifications were exchanged at Bogotá, March 1, 1922.[2]

The first diplomatic problem that Secretary Hughes was forced to consider upon entering the State Department was a boundary dispute between Panama and Costa Rica. The trouble was of long standing but the Porras-Anderson Treaty signed in 1910 in Washington through the mediation of the United States was supposed to have settled the difficulty. But the award by Chief Justice White in 1914, after a careful survey, in accordance with the terms of the treaty, was not acceptable to Panama. Costa Rica made no effort to take possession of the territory awarded her until February, 1921, and then Panama resisted. Secretary Hughes first asked both parties to suspend hostilities until the United States could consider the question. After studying the matter carefully, Secretary Hughes found the award just, and urged Panama to accept it. Upon her refusal he declared that unless she settled the dispute promptly in accordance with the terms of the convention, the United States would take the necessary steps to give effect to the physical establishment of the boundary line. Panama appealed to President Harding but in vain, and shortly afterwards Costa Rica took possession of the territory awarded her. Although Panama felt that the United States should have supported her claim due to the advantages gained by the Hay-Bunau-Varilla treaty, Secretary Hughes judged the

[1] *Congressional Record*, Vol. LXI, No. 2, p. 81.
[2] For text see Treaty Series, No. 661 (Wash. 1922).

case purely on its merits, and the settlement was on the whole favorably received by the Latin-American republics.

President Harding had an opportunity to express his attitude towards the Latin-American nations in an address delivered April 19, 1922, in commemoration of the unveiling of a monument to Bolivar. Upon this occasion he declared: "I would like this date to be the corner-stone of a new era for South and North America . . . I know I speak the spirit of the United States when I say that no self-consciousness compels, no envy exists, no hatred is actuating . . . Pan-Americanism means sympathetic and generous Americanism."[3]

Tangible evidence of an intention to translate these sentiments into action was shown by the speedy and earnest effort of the United States to put an end to the military occupation of the Dominican Republic and to improve the situation in Haiti. As a candidate for the presidency Mr. Harding had evinced a lively interest in the question, and within three months of his election Admiral Robison was authorized to issue a proclamation promising withdrawal providing the Dominicans would cooperate with the Americans in establishing a stable constitutional government. Serious difficulties were encountered and it was not until July 11, 1922 that a basis of withdrawal was agreed upon satisfactory to both parties. The arrangement contemplated the establishment of a provisional government without the intervention of the United States. The principal conditions attached referred to the fulfillment of the Convention of 1907.[4] The provisional government was set up October 21, 1922 and three days later Admiral Robison withdrew from the island with his staff. About 1500 marines were left until a constitutional government succeeds the present provisional administration. The Harding administration deserves to receive credit for carrying out its pledges, although it remains to be seen whether the withdrawal will be beneficial ultimately to the Dominican people.

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[3] *New York Times*, January 28, 1921.

[4] For details, see *Current History*, August, 1922.

Remembering the hue and cry raised in some of the periodicals of the United States against American occupation, it may not be amiss to quote a South American on the subject. Senor Alfredo Colmo, writing in *Nosotros* of Buenos Aires under the date of June, 1921, had this to say regarding the occupation of the Dominican Republic: "The North American occupation has aroused the opposition of the Dominican politicians alone. The rest of the population not only has not regretted its presence but in some cases it has gone so far as to praise it and request that it continue."

The relations of the Harding administration with Cuba have not been entirely free from difficulties. The results of the 1920 elections were contested and General Enoch Crowdder was sent over to supervise secondary elections. When these again favored Dr. Zayas, General Gómez his opponent, appealed to President Harding. It was in vain, however, and the United States recognized Dr. Zayas as the duly elected president. Owing to the government's financial problems, General Crowder remained in Havana to investigate and if possible to suggest reforms.[5] The Cuban government was anxious to float a $50,000,000 loan in the United States but as this was impossible under the Platt amendment unless the revenue were sufficient to meet amortization and interest, a new tax measure had to be passed and the approval of Washington obtained. After a thorough investigation General Crowder urged a reform program which, among other things, provided for a modification of the civil service law, giving the president more power to organize executive departments, particularly the service of collecting and controlling revenue, a better accounting system, and the establishment of a debt commission. President Zayas supported this program vigorously before Congress and the Cuban minister to the United States, Dr. Carlos de Cespedes, was able to assure Secretary Hughes in October, 1922, that the greater part of the reforms had been put into execution. Formal request for approval of the

[5]For an interesting discussion of the situation, see article by F. W. Wile in *Christian Science Monitor*, April 8, 1922.

loan was made to the State Department on October 18, and the request granted November 2. The United States was not unmoved by the valuable services performed by General Crowder and the evident effort on the part of the Cuban administration to co-operate heartily with him, for early in 1923 the United States representative to Cuba was raised to the rank of ambassador and General Crowder was appointed to the position. As a further indication of a desire to do full justice to Cuba, Secretary Hughes also brought up the Isle of Pines treaty which had remained hidden for eighteen years. On December 6, 1922, at his request it was favorably reported to the Senate, and although approval was not obtained in the Sixty-seventh Congress it is hardly likely to be delayed much longer.

Perhaps the greatest and most legitimate cause of Cuban dissatisfaction with the policies of the United States is based upon the Fordney-McCumber tariff bill. Realizing that because of its geographical position Cuba is absolutely dependent upon the United States, and also that the United States has profited enormously by this situation, the Cubans feel keenly the injustice to the mof the increase in the tariff upon sugar. The argument that the United States should protect the beet sugar interests so that a fair share of its sugar might be raised upon its own territory is ridiculous when the terms of the Platt amendment are taken into consideration. A very fair presentation of the case was made by Señor Luis Marino Pérez in a paper read before the *Sociedad Cubana de Derecho Internacional* on March 2, 1922: "As this protection tends to the destruction of the sugar industry of Cuba, to the economic ruin of our country, to the detriment of the great amount of capital invested in Cuba, and to the retardation of the development of commercial relations between the two countries, it tends frankly to nullify and contradict the policy that it would seem natural for the United States to maintain towards Cuba."[6]

In regard to Porto Rico President Harding made the mistake of allowing his generosity to outweigh his judgment.

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[6]Quoted in *Inter America*, August, 1922.

Ever since the Jones Act passed in 1917, the position of governor of Porto Rico has been a difficult one unless the appointee was willing to work in harmony with the dominant Unionist party. Inasmuch as one of the planks of this party's platform is independence, it requires real tact and diplomacy on the part of the governor to work in harmony with it. When Mr. E. Mont Reily of Kansas City, Missouri, was appointed to the position apparently on the basis of his political services to the Republican party trouble began. Mr Reily was equipped neither by training nor temperament for the position. He was in constant difficulties with the Unionists, and serious charges were brought against him both in Porto Rico and in Washington. President Harding stood manfully by his choice but at length the split became so serious that something had to be done. The obvious thing was for Governor Reily to resign—particularly since he had not found the climate of Porto Rico particularly salubrious. There is little doubt that Governor Reily's resignation was the most popular act of his administration. President Harding profited by the experience, and in February, 1923, he appointed Judge Towner of Iowa to the position. As Judge Towner had served for many years as a member of the committee on insular affairs in Congress, and had made several visits to Porto Rico to study the conditions there, the appointment seemed a most excellent one. The fact that both Commissioner Dávila in Washington, and Mr. Barceló, leader of the Unionist party in San Juan, approved heartily of the appointment should aid Judge Towner materially in his new position.[7]

Undoubtedly the outstanding achievement of the Harding administration in regard to Latin-American affairs has been the Central American Conference at Washington. Apparently the idea of the conference germinated in a conference of the presidents of Nicaragua, Honduras and Salvador on the American warship, *Tacoma*, in August, 1922, to concert measures looking to more friendly relations between these three countries. Gratified at the action of the three

[7]See *Congressional Record* for March 1, 1923, p. 5091.

powers in acknowledging the validity of Treaty of Washington of 1907, the administration felt that friendly relations could be still further assured by a frank exchange of views and recommendations. The result was an invitation from the United States to the five states of Central America to assemble in Washington, December 4, 1922, to consider the discussion of the following subjects: (1) The negotiation of treaties to make effective those provisions of the Washington treaties of 1907 which experience has shown to be useful in maintaining friendly relations; (2) the adoption of effective measures for the limitation of armaments in Central America; (3) the formulation of plans for establishing tribunals of inquiry for the settlement of disputes which fail of settlement by diplomatic means.

In his address of welcome to the delegates Secretary Hughes laid down certain bases of conduct which would govern the Harding administration in its relations with its Caribbean neighbors which are well worthy of notice: "The government of the United States has no ambition to gratify at your expense, no policy which runs counter to your national aspirations, and no purpose save to promote the interests of peace and to assist you, in such manner as you may welcome, to solve your problems to your own proper advantage. The interest of the United States is found in the peace of this hemisphere and on the conservation of your interests."[8]

After two months of deliberations the conference came to an end on February 7, 1923, with most promising results. A number of treaties and conventions were signed, among which were a general treaty of peace and amity, a convention for the establishment of an international Central American tribunal, and a convention for the limitation of armaments. The latter is important in that it not only prohibits the acquisition of warships, and limits the number of airplanes to ten, but it also limits the number of enlisted men in the standing armies to these quotas: Guatemala 5,200; El Salvador 4,200; Honduras 2,500; Nicaragua

[8]Bulletin of the Pan-American Union, January, 1923, p. 2.

2,500; Costa Rica 2,000. The convention reestablishing the Central American Court of Justice replaces the Convention of 1907, and provides that the new tribunal shall have jurisdiction over all controversies arising between the Central American Republics not settled by diplomatic means. In his closing address Secretary Hughes complimented the delegates upon the success of their deliberations and assured them that they had furnished "an agreeable and helpful example of the advantages of conference, provided always that it is dominated by a firm determination to find the solutions of amity and is animated by the belief that these will better serve the aims of security and progress than any possible strife."[9]

If the results of this conference should point the way to similar action in the fifth Pan-American Conference now going on in Santiago, Chile, surely considerable credit will be due to Secretary Hughes. Considering the personal success that Secretary Hughes had in both the Washington Conference for the Limitation of Armament and the Central American Conference it is most unfortunate that the press of duties prevents his participation in the Santiago Conference, particularly since the agenda includes not merely the consideration of economic and commercial problems which have regularly been discussed at such conferences, but also such important political questions as arbitration, the limitation of armaments, and the Monroe Doctrine—or at least something that has a very close likeness to the Monroe Doctrine.[10] However, the American delegation is quite an eminent one, including as it does Henry P. Fletcher, ambassador to Belgium, and formerly minister to Chile and Mexico, as chairman; Senators Kellogg and Pomerene of the committee on foreign affairs of the Senate, and Dr. L. S. Rowe, director of the Pan-American Union. Considering the fact that practically all the participants in the

[9]Bulletin of the Pan-American Union, March, 1923, p. 228.

[10]Article 16 of the program covers "questions arising out of an encroachment by a non-American power on the rights of an American nation."

conference except the United States are active members of the League of Nations and that Señor Augustín Edwards, who is to preside was also the president of the last assembly of the League at Geneva, the representatives of the United States are likely to need considerable diplomatic *savoir-faire*. The ultimate success of President Harding's Latin-American policy may to a considerable extent be dependent upon the results of the Santiago Conference.

One other deserved triumph of the Harding administration in its relations with the republics of Latin-America has been the apparent success in finding a solution for the Tacna-Arica dispute—the Alsace-Lorraine question of Hispanic America. This question relating to the ownership of the two provinces of Tacna and Arica, which by the Treaty of Ancon signed in 1883, were given to Chile for ten years, with the proviso that after that period a plebiscite should determine their status, has failed of solution after innumerable efforts to settle it. In spite of the discouraging background President Harding invited Chile and Peru to send delegates to Washington to thresh out the question under the auspices of the United States. The invitation was accepted and the conference was opened by Secretary Hughes, May 15, 1922 in the Pan-American Building. After arduous sessions for two months a protocol of arbitration and a supplementary act were signed on July 20, which provided for submission to the President of the United States the question as to whether a plebiscite should be held to decide the ownership of the provinces of Tacna and Arica in accordance with Article 3 of the Treaty of Ancon, and if so under what conditions. If the arbitrator decided that the plebiscite should not be held both parties agreed to enter into a discussion of the question, and if no agreement were reached the two governments would request the good offices of the government of the United States in order to reach an agreement.[11] There is still a chance for failure, but the fact that both powers ratified the

[11]For an excellent summary of the question, see the article by Professor Borchard in *Foreign Affairs*, September, 1923.

agreement and that their representatives are now in Washington preparing their cases argues favorably for the settlement of the question.

Undoubtedly the one weak link in the chain of friendship with which President Harding and Secretary Hughes have been endeavoring to bind the Latin-American republics to the United States is that of Mexico. Alvaro Obregon was inaugurated President of Mexico on December 1, 1920, and the Wilson administration, whose term was soon to expire, thought it best to leave the question of recognition to the incoming administration. Shortly before taking the portfolio of the Interior in President Harding's cabinet, Senator Fall had indicated that recognition must be preceded by a formal agreement on the part of Mexico to protect American property rights as against confiscation under Article XXVII of the Constitution of 1917.

Secretary Hughes made public a statement of the attitude of the United States on June 7, 1921, in which among other things he said: "The fundamental question which confronts the Government of the United States in considering its relations with Mexico is the safeguarding of property rights against confiscation. . . . This question is vital because of the provisions inserted in the Mexican constitution promulgated in 1917. If these provisions are to be put into effect retroactively, the properties of American citizens will be confiscated on a great scale. This would constitute an international wrong of the gravest character, and this government could not submit to its accomplishment. If it be said that this wrong is not intended and the constitution of Mexico will not be construed to permit or enforced so as to effect confiscation, then it is important that this should be made clear by guarantees in proper form. . . . Accordingly, on the 27th day of May last, Mr. Summerlin, American *chargé d'affairs* at Mexico City, presented to General Obregon a proposed treaty covering the matters to which reference has been made. The matter is now in the course of negotiations and it is to be hoped that when the nature of the precise question is fully appreciated the obstacles

which have stood in the way of a satisfactory settlement will disappear."[12]

Almost two years have elapsed since that time and although the Obregon government has maintained peace and order in Mexico, although President Obregon has stated that Article XXVII was not intended to apply retroactively, and the Mexican Supreme Court has decided in five separate opinions that the provisions of Article XXVII are not retroactive, recognition is still withheld. The whole situation was made the more difficult by a diplomatic *faux pas* made by the United States in the fall of 1922. The Mexican government in October, 1922, was contemplating the passage of legislation for the regulation of the oil interests and the American chargé, Mr. Summerlin, received a copy of the proposed organic law. The United States government, under the impression that its opinion as to proposed legislation was invited, informed Albert Pani, the Mexican Secretary of Foreign Affairs, that the protection proposed for American interests was entirely inadequate. Thereupon in a curt reply the Mexican government informed Mr. Summerlin that President Obregon was ignorant of the source from which the project came and that "the honor and sovereignty of the nation make it absolutely impossible to accept laws, which are the exclusive rights of the federal legislative power, which receive the previous censorship of governments of other countries." When the question came up in the Mexican Chamber of Deputies on November 17, President Obregon was heartily supported for his stand and the United States severely criticised for its unwarranted action.[13]

Recently, however, indications have appeared that the situation is clearing. On April 23, 1923, the State Department made the following announcement: "With the view to hasten the reaching of a mutual understanding between the United States and Mexico, two American commissioners and two Mexican commissioners will be appointed to meet

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[12] *New York Times*, June 8, 1921.

[13] *New York Times*, November 20, 1922.

for the purpose of exchanging impressions and of reporting them to their respective authorities." The following day Secretary Hughes announced that the American commissioners would be Charles Beecher Warren, formerly United States ambassador to Japan, and John Barton Payne, Secretary of Interior under the Wilson administration. It was further declared that both the United States and Mexico wished to expedite a settlement in every possible way.

It is rather unfortunate that a settlement was not reached before the opening of the Santiago Conference, inasmuch as Mexico has refused to participate in that conference because of the non-recognition policy of the United States. The Obregon government has been so evidently friendly in all its relations with the United States, and has been so successful in spite of the many serious obstacles which it has encountered, that it would seem the part of wisdom to give it every possible encouragement. Many chambers of commerce and commercial organizations have passed resolutions urging recognition, particularly those closest to the Mexican border, many business men who have had means of examining the situation at first hand have supported it, and more than one-fourth of all the state legislatures have passed resolutions advocating it. Taking into consideration the remarkably sympathetic policy which the Harding administration has followed in its dealings with all the rest of Latin-America, the re-establishment of cordial relations with Mexico might well prove to be the keystone of a new and substantial arch of American solidarity.

The present time, marking as it does the hundredth anniversary of the Monroe Doctrine, is peculiarly appropriate to the clarification of intentions. What the world needs today is more friendly co-operation and less jealous competition, more easy approaches to mutual understanding and fewer barriers provoking hostility and suspicion. Secretary Hughes, speaking in Cleveland on November 4, 1922, formulated the bases of our foreign policy in such clear and forceful phrases that this speech should stand with Secretary Root's famous declaration made at Rio de Janeiro in

1907, as the fundamental concept of a truly American policy: "The principles of American foreign policy are simple and readily stated. We do not covet any territory anywhere on God's broad earth. We are not seeking a sphere of special enonomic influence, and endeavoring to control others for our aggrandizement. We are not seeking special privileges anywhere at the expense of others. . . . We wish to maintain the equality of common opportunity, as we call it the open door. That is not in derogation of anybody else, the door is just as open to others as it is to us. Equality means equality. It doesn't mean privilege. . . . We have constantly testified to our deep interest in the prosperity, the independence, and the unimpaired sovereignty of the countries of Latin-America."

After a careful consideration of the facts it would appear that these sentiments were not merely empty, sonorous phrases tuned to the occasion, but the keynote of the administration's policy in Latin-American affairs.

NEWS AND NOTES

EDITED BY B. F. WRIGHT, JR.

University of Texas

THE ANNUAL MEETING OF THE SOUTHWESTERN POLITICAL SCIENCE ASSOCIATION

Sixty delegates and visitors representing twenty-one colleges and universities, six social service organizations and four Southwestern states, Arkansas, Louisiana, Oklahoma, and Texas gathered at Southern Methodist University, Dallas, Texas, April 2 to 4, 1923, to attend the Fourth Annual Meeting of the Southwestern Political Science Association. Among those participating in the discussions were college and university professors of Political Science, Economics, Sociology, History, International Relations and Public Law as well as lawyers, business men, editors, public officials and citizens interested in public affairs.

At the morning session, Monday, which was devoted to Public Law, Professor D. Y. Thomas, Third-Vice-president of the Association, presided in the absence of Mr. G. B. Dealey, First Vice-president, who was unable to attend. Dr. R. S. Hyer, President Emeritus, of Southern Methodist University welcomed the Association in a cordial address. A paper was read by Professor C. Perry Patterson of the University of Texas on "The Jury System of the Southwest," which was discussed by Mr. Alex Spence of Dallas.

Informal discussion of the morning program was continued at the luncheon conference which was held at the Rotunda Tea Room.

International Relations was the general topic taken up at the afternoon session Monday, presided over by Professor J. P. Comer of Southern Methodist University. The program consisted of papers by Professor Malbone W. Graham of the University of Texas on "Humanitarian Intervention in International Law as Related to the Practice of the United States"; by Professor J. L. Clark, Sam Houston Normal College, on "Effect of the War upon the National Spirit of the Colored Peoples"; and by Professor D. Y. Thomas, University of Arkansas, on "The International Court of Justice." Professor Clark's paper was discussed by Professor R. A. Hearon of Southern Methodist University and Professor Thomas' paper by Professor Clyde Eagleton of Southern Methodist University.

Members of the Association were guests at a dinner given at 6:30 p. m. in the Woman's Building, Southern Methodist University. Mr. G. B. Dealey, Dallas, First Vice-President of the Association,

presided. Short addresses were made by Dr. C. C. Selecman, President, Southern Methodist University and by Dr. Kenyon L. Butterfield, President, Massachusetts Agricultural College.

Judge J. E. Cockrell, President of the Board of Trustees of Southern Methodist University, presided at the public meeting Monday evening. An address on "Organs of Christian Rural Progress" was delivered by Dr. Kenyon L. Butterfield.

Four papers were read at the History Section Tuesday morning with Professor C. W. Ramsdell of the University of Texas presiding: "The Relation Between History and the Social Sciences," by Professor M. S. Handman of the University of Texas; "The Opportunities of Historical Research in Austin," by Mr. E. W. Winkler, University of Texas Library for Professor M. R. Gutsch of the University of Texas, who was unable to attend; "Methods of and Opportunities for Study of Local History," by Professor D. F. McCollum, East Texas State Normal College; "The Panhandle Plains Historical Society," by Professor L. F. Sheffy, West Texas State Normal College. The paper on "The True Mr. Froude," by Professor C. H. Walker of Rice Institute, who was unable to attend, did not arrive in time to be read at this session.

On Tuesday afternoon the program was devoted to problems of government with Professor S. J. Brandenburg of the University of Arkansas presiding. Papers were read as follows: "The Contents of State Constitutions," by Professor John C. Granbery, Southwestern University; "Who Should Organize State Administration?," by Professor F. F. Blachly, University of Oklahoma; "The Louisiana Constitutions of 1913 and 1921," by Professor Theodore G. Gronert, University of Arkansas.

An interesting session on nominating systems presided over by Professor F. F. Blachly of the University of Oklahoma was held on Tuesday evening at which a paper on "The Direct Primary vs The Convention" was presented by Mr. Tom Finty, Jr., Editor of The Dallas Journal. A lively discussion followed the reading of the paper.

Mr. T. H. Junkin of Dallas presided over the Wednesday morning session which was devoted to Economics. The following papers were read: "The Financing of Highways in Texas," by Dr. W. M. W. Splawn, Railroad Commissioner, Austin, discussed by Professor H. H. Guice, Southern Methodist University and Mr. Nathan Adams of Dallas; "State Income and Taxation," by Professor E. T. Miller, University of Texas, discussed by Professor O. E. Baker of Simmons College; "The Contents of a First Year Course in Social Science," by Professor S. J. Brandenburg, University of Arkansas, discussed by Professor C. T. Neu, East Texas State Normal College, Professor R. E. Sheppard, Texas Christian University, Professor R. A. Hearon, Southern Methodist University, and Mr. W. F. Doughty, Dallas.

A joint session of the Sociology Section and the Council of Statewide Social Agencies Wednesday afternoon was the concluding session of the program presided over by Professor S. L. Hornbeak of Trinity University in the absence of Dr. Jerome Dowd of the University of Oklahoma. Papers were read by Professor W. E. Garnett, Agricultural & Mechanical College of Texas on "The Present Status of Farm Tenancy in the Southwest"; by Professor W. P. Meroney, Baylor University on "Suggestions for the Solution of the Problem of Farm Tenancy." Professor A. W. Hayes, Tulane University of Louisiana, who was to have read a paper on "Society's Stake in Farm Tenancy," was unable to be present and his paper was read by Professor C. M. Woodward of Southern Methodist University. Mr. W. O. Brown of Southern Methodist University discussed Professor Hayes's paper.

The annual business meeting of the Association was held on Tuesday, at 1 p. m. Second Vice-president Blachly presided in the absence of President Ames and First Vice-president Dealey. On motion, the reading of the minutes of the last annual business meeting was dispensed with.

Mr. Frank M. Stewart of the University of Texas, Editor in Charge of the Quarterly, reported on the status of the official publication, on behalf of the Editor, Professor Herman G. James of the University of Texas, who is on leave of absence engaged in research work in Brazil.

The Secretary-Treasurer's report on membership and finances showed a total membership of 172 (8 contributing, 10 sustaining, and 154 active); a balance of $223.92 in the Association treasury and a balance of $46.15 in the University of Texas publication fund available for expenditure before September 1, 1923.

Officers for the year 1923-1924 were elected as follows: President, Mayor E. R. Cockrell, Fort Worth; First Vice-president, Mr. G. B. Dealey, Dallas, reelected; Second Vice-president, Professor F. F. Blachly, University of Oklahoma, reelected; Third Vice-president Professor D. Y. Thomas, University of Arkansas, reelected. Professor Walter Prichard, Louisiana State University was elected on the Executive Committee and Professor E. T. Miller, University of Texas, was reelected.

The Chairman appointed as a committee to confer with the History group regarding affiliation of the two organizations Professors D. Y. Thomas, J. P. Comer, and C. P. Patterson.

Professor Handman suggested the appointment of a Committee by the President of the Association to look into the question of permanent support of the Association by means of endowment, sale of stock, or otherwise. The suggestion was approved.

Professor Patterson suggested the appointment of a Committee by the President of the Association for the raising of funds for the Association from the institutions of the Southwest for the current year.

It was agreed that every school represented at the meeting should have one member on this committee.

A meeting of the Committees to consider the relation of the History group to the Association was held after the adjournment of the business meeting with all members present. An agreement was reached that the History organization should be retained for their own purposes, that history teachers should join the Association as individual members, that the name of the Association should be changed to "The Southwestern Political and Social Science Association" and a like change in the name of the Quarterly, and that the History group should have a section on the program of the annual meetings. This agreement was to become effective after ratification by the Executive Committee of the Association and by the History group.

The Executive Committee at a meeting on Tuesday evening reelected Professor Herman G. James of the University of Texas, Editor of Publications, and Mr. Frank M. Stewart of the University of Texas as Editor in Charge and Secretary-Treasurer.

The officers selected at the business meeting and by the Executive Committee together with Ex-Presidents, A. P. Wooldridge of Austin, Texas, George Vaughan of Little Rock, Arkansas, and C. B. Ames of Oklahoma City, Oklahoma, constitute the Executive Committee. All members of the Advisory Editorial Board were reelected as follows: Professor F. F. Blachly, University of Oklahoma, Professor C. F. Coan, University of New Mexico, Professor M. S. Handman, University of Texas, Professor D. Y. Thomas, University of Arkansas, and Professor G. P. Wyckoff, Tulane University of Lousiana.

The agreement with the History group was ratified.

An invitation was received from the Agricultural & Mechanical College of Texas for the next meeting, but selection of the next meeting place was postponed for further consideration by the Executive Committee.

A second business session was held at Wednesday noon. An amendment to the Constitution of the Association to change the name of the Association to "The Southwestern Political and Social Science Association" and the name of the Quarterly to "The Southwestern Political and Social Science Quarterly" was unanimously adopted and voted to become effective at once.

NOTES FROM ARKANSAS

PREPARED BY THEODORE G. GRONERT
University of Arkansas

The evil of local legislation was very notable by its presence in the last legislature. Over 1300 local bills were introduced and in consequence important legislation was held up until the last few days of the session, or was not passed at all.

In addition to the severance tax, two additional measures of general significance were passed. A gross income tax of one-tenth of one per cent on incomes in excess of $1000 was passed, and a tax of three cents per gallon was levied on all gasoline sold in the state. The money realized from the gasoline tax was to be utilized in highway maintenance and construction; seventy-five per cent going back to the counties and twenty-five per cent to the State Highway Department. This tax was passed over the governor's veto.

A tax bill providing for full assessment of all property and the reduction of the rate of taxation on a sliding scale was passed by the Senate but defeated in the House.

A privilege tax on persons engaged in business or professions did not get beyond the preliminary stage in the Senate.

An interesting and unusual question arose concerning the right of a legislative body to void an act once formally passed and sent to the governor for his approval or disapproval.

In one case the House had passed a local measure permitting a referendum on Sunday baseball in Phillips County. The bill was sent on to the governor but before he had acted on it the House voted to expunge from the records all reference to the bill. The failure of the governor to sign the measure in question rendered a court decision on its status unnecessary. A more serious case occurred in connection with the Senate's action in expunging from its journal all record of the Agricultural Department appropriations. This bill had passed both houses and had been signed by the governor, hence it is very doubtful if the Senate's action could affect the status of the bill. The commissioner of agriculture has secured a writ of mandamus ordering the secretary of the Senate to include in the Senate's Journal a record of the appropriation bill for the Department of Mines, Manufacture and Agriculture. If this plan fails the commissioner intends to secure a writ of mandamus requiring the secretary of state to certify the passage of the Appropriation Bill to the state auditor, so that the auditor may have the legal authorization to issue vouchers against the appropriations.

Another interesting question facing the courts involves the severance tax. The American Bauxite Company has enjoined the Arkansas Railroad Commission from collecting the tax on bauxite on the grounds that the tax was unjust and discriminatory. (It is worthy of note that one of the complaints made by the governor regarding the legislature was on its failure to provide a tax collecting agency. The tax collecting duty then devolved on the Railroad Comsion.)

The Senate voted down a highway measure providing an adequate maintenance fund, and including other provisions deemed necessary to secure the benefits of federal aid. The governor then vetoed the state highway appropriation measure on the ground that the appropriations were not itemized, that no provision was made for the main-

tenance of roads, and that such appropriations were undesirable if the state were to be deprived of federal aid. At this time (May 1) the highway problem is still unsettled and apparently only a special session can save the situation. A failure to meet the national government's conditions would result in the loss of approximately $3,500,000 in federal aid.

NOTES FROM OKLAHOMA

PREPARED BY MIRIAM E. OATMAN

Norman, Oklahoma

ADMINISTRATION MEASURES PASSED.—Oklahoma's Ninth Legislature ended its regular session amid the usual onslaught of complaints from those who objected that nothing had been accomplished and those who insisted that too much money had been appropriated. The most interesting feature of the session was the remarkable show of power made by Governor Walton, who succeeded in having passed a surprisingly large proportion of the bills which were sponsored by him and known as "administration measures." Among these were a free text-book bill, a state warehouse system measure, a bill making significant changes in the workmen's compensation law, a market commission bill, and a bill establishing a supreme court commission of fifteen members. The supreme court commission was established in order to assist the supreme court in clearing its docket, which is now several years behind. The members of this commission are nominated by the governor and confirmed by the supreme court.

IMPORTANT TAX MEASURES.—The legislature provided for a commission to revise the tax code, and to report to the governor its findings, together with drafts of necessary statutory and constitutional changes, by September, 1924. A constitutional amendment was proposed, providing for an ad valorem state tax sufficient to provide a fund for the benefit of public schools, amounting to fifteen dollars a year for each pupil. An appropriation of $2,150,000 was made in order to return to the taxpayers moneys which were collected in 1921, over and above the needs of the fiscal year, hence illegally collected. As this appropriation is to be paid from any surplus in the general fund, and there will apparently be no surplus, the attorney-general has declared that this law cannot be carried out. An excise tax of one cent a gallon on gasoline was established, which will be distributed to the various counties, to be applied to the building of state highways. A soldiers' bonus bill was passed; which will be voted upon by the people.

MUNICIPAL LEGISLATION.—The Oklahoma Municipal League worked for the passage of several bills which were designed to benefit cities. A number of these were passed, including a zoning law, a

city planning law, and an improved street paving law which experts declare is so superior to the old one that it will undoubtedly increase the selling value of municipal paving bonds by ten or fifteen per cent.

CAPITAL PUNISHMENT NOT TO BE ENFORCED.—Just at the close of the legislative session Governor Walton announced that during his term of office he will not permit the death penalty to be enforced; but that in every case where the courts impose a sentence of capital punishment, he will commute it to life imprisonment with hard labor. Press comment was almost unanimous in condemning this announcement as a violation of the governor's oath to uphold the laws of the state; though some few papers urged that in exercising the power to pardon and reprieve the governor is acting within his right.

LEGISLATIVE APPROPRIATIONS VETOED.—The legislature appropriated about $33,000,000 for the next biennial period. The governor vetoed appropriations amounting to $5,000,000 of which sum $3,500,000 was cut from institutional appropriations. Three of the five buildings which had been promised to the University were vetoed; and the maintenance appropriation was changed by the governor from about $750,000 to $500,00 a year. Several leading lawyers have expressed the opinion that according to a case decided in the time of Governor Haskell, the failure to approve this item as it stood constitutes a veto, as the governor has no right to alter items. If the courts uphold this contention, the governor will be compelled to call a special session of the legislature for the purpose of supplying funds to the university; or it will be unable to open its doors in September.

POLITICAL UPHEAVAL IN STATE SCHOOLS.—Since the close of the legislative session Governor Walton has dismissed the boards of regents of several state schools and replaced them with boards of his own appointing. George Whitehurst, the elected President of the Board of Agriculture, is ex-officio at the head of the board which controls the Agricultural and Mechanical College; but the other members are appointees of the governor. Whitehurst declares that the changes in the board have been made in order that the presidency of the school may be given to one of Walton's political friends. Changes in the board of regents of the University of Oklahoma were accompanied by rumors that the president and several deans were to be dismissed, to make room for friends of the governor. The alumni of the university held a meeting in Oklahoma City at which resolutions were passed urging the retention of President Stratton D. Brooks, the separation of schools from all political influences, and the securing of a president from outside the state in case of Brooks's departure. In the meantime President Brooks had accepted the presidency of Missouri State University. The new board of regents held its first meeting at the capitol in Oklahoma City, and appointed Dean J. S. Buchanan as acting president of the University of Oklahoma until a permanent incumbent

can be secured. Several resignations among the faculty have followed that of President Brooks.

NOTES FROM TEXAS

PREPARED BY THE EDITOR OF NEWS AND NOTES

THE POUND LECTURES.—During the week of April 16 Dean Roscoe Pound of the Harvard Law School delivered a series of lectures to the students and faculty of the University of Texas. The general subject discussed was that of Legal Interests, the subject being treated in five lectures: The Theory of Interests, The Weighing and Valuing of Interests, A Classification of Interests, The Means of Securing Interests, and The Limits of Effective Legal Action.

Because of the very large amount of historicial and philosophical material treated by the lecturer, it would be impossible to give a summary of the lectures in brief space. However, it may be worth while to attempt to give some indication of the more outstanding points of the discussions. For although Dean Pound was not attempting to uphold any particular thesis, it was evident to those of his hearers who were at all familiar with his published writings that his theory of interests is but a part of his whole system of legal thought, and that so far as he ventured any criticism at all, it was from the standpoint of the sociological jurist.

In the second lecture the recent tendency to think more and more in terms of interests, rather than of rigidly fixed legal rights was pointed out. Furthermore, as a result of infusions from the other social sciences, the law has come to recognize a greater social interest in the individual welfare. But instead of leading to another period of emphasis upon the rights of individuals, this is leading to the subordination of rights to questions of policy (the very thing Justice McKenna viewed with alarm), and has led to the courts to balance the interests involved in the cases before them rather than attempt to fit the set of facts into a rigid scheme of legal rights. Another result of this increased zeal for the welfare of the individual and of society as a whole has been the increased burden placed upon all agencies of law making and enforcement. Especially has the problem of effective enforcement of the law become an acute problem.

Another point of importance was the backwardness of the Common Law so far as the development of preventive justice is concerned. We continue to depend almost entirely upon punishment or substitution of redress for our legal sanctions; even as regards specific redress the law of the Continent is decidedly ahead of our own system. The field for great development in the future (so far as the question of enforcement is concerned) is to be found in the improvement of principles and agencies of preventive justice.

It has been announced that the lectures will be published in book

form by the University of Texas during the late summer or early fall.

MUNICIPAL LEAGUE MEETING.—The Eleventh Annual Convention of The League of Texas Municipalities was held at Bryan, Texas, on May 9 and 10. Important questions of municipal government and administration, including city planning and zoning, the city manager plan, taxation, bonds, play-grounds, paving, and health and sanitation were discussed. Resolutions were adopted endorsing the proposed highway amendment to the State Constitution to be voted on in July of this year and providing for the appointment of committees to draw up a comprehensive bonding law and zoning and planning law for presentation to the next regular session of the Legislature.

Officers elected were: W. E. Lea, Mayor, Orange, President; D. F. Howell, Mayor, Cleburne, First Vice-President; G. W. Middleton, Mayor, Texarkana, Second Vice-President; O. F. Holcombe, Mayor, Houston, Third Vice-President. The officers with past President E. R. Cockrell, Mayor of Fort Worth, and Executive Secretary, Frank M. Stewart, Head of the Division of Government Research, Bureau of Extension, University of Texas, constitute the Executive Committee.

Paris was selected for the 1924 convention city and the Twelfth Annual Meeting will be held there in May, 1924, the exact dates to be announced later by the Executive Committee.

BOOK REVIEWS

EDITED BY MALBONE W. GRAHAM
University of Texas

POTTER, PITMAN B. *An Introduction to the Study of International Organization.* (New York: The Century Co., 1922. Pp. xiv, 647.)

As an introduction to the study of international organization—a phrase of as great historical significance as international law was earlier—this book is admirable. It is written in a style sufficiently devoid of technicalities, and is sufficiently comprehensive, to serve excellently the needs of the general reader; while the keen analysis, critical discussions, and thorough documentation make it equally as valuable to the student who plans to carry his studies further. It is not a summary of timeworn facts, as might be expected, but a critical survey of the latest investigations over a surprising range. His method is to work out the evolutionary forces of history from ancient times; and he does not hesitate to dissect the most widely accepted conclusions. The value to the ordinary reader may be illustrated by his discussion of the reasons why an ambassador can hardly be chosen by a merit system.

To the reviewer, the greatest interest in reading the book was the development of the inevitable march of history toward international organization, with the resulting inevitable subordination in our own day of nationality. "The process of centralization seems to be general, continuous, and persistent" (449). Part I develops the appearance of nation states out of the ancient idea of empire and concludes that "St. Helena and Amerongen have ratified the teachings of Canossa and Anagni" (57). In successive parts are developed separately Modern Diplomacy, Treaties and International Law, International Arbitration, International Administration, International Conferences, and International Federation;and Part VIII concludes with a description of the present agencies of international organization.

In each of these we are brought up against the impasse of a failure to organize; and in each, quite incidentally, the theory of national sovereignty is undermined. The failure of diplomacy, first, is due to its scattered objectives and to the lack of an intelligent public interest. The reviewer has often wondered why the public should not criticise a foreign policy as severely as it sometimes does an internal policy—the Volstead Act, for example. There is hope that this may some day be true if we accept the author's statement that the "equalitarianism and excessive nationalism of an earlier day has yielded to common sense" (107). In treaty negotiation the same two characteristics are noticeable. While it is true that "no state can hope to hold another to treaty obligations apart from some substantial degree of

mutual benefit or in circumstances endangering the safety of the state" (155) at the same time the "character of the treaty nexus is being altered within itself.... Bargains on concrete questions of permanent significance are being superseded by what looks very much like international legislation on legal and governmental matters of general and continuing interest" (170). Likewise with regard to mediation and arbitration: While "no nation could bring itself to submit to arbitration a question imputing to it dishonor and shame" it is also true that "conceptions of what affects national honor are changing" (219). The central issue just now is how to get cases before the court. The statement that "one of the marks of a true federation is to be found in the power of the organs of the federation to act upon individual members of the federation states and not merely upon or through those states as such" (246) must be of great interest to those who opposed America's entrance into the League. But any international court will be of little value as long as "we know but little about the inherent nature and the essential rights and wrongs of international life. Even the basic principles are hardly fixed yet" (258). The Court must have a law to enforce; and diplomacy and conferences are the only machinery we yet have for this purpose. In conferences "national desire rather than inherent reason and right or the general interest, governs the outcome" (324), but of late "there has appeared a tendency to expand the peace conference to include several, and indeed, many powers." Nations have organized various international bureaus; but, "having been unable for lack of adequate international governmental methods, to prevent the war, the world was unable for the same reasons, to bring it to a firm conclusion" (356).

Having shown that the next step in historical development is to gather the six forms of international organization thus far traced into a comprehensive system, he turns to the conflict between national sovereignty and international federation, and finds that there is none, —that as sovereign nations have often voluntarily limited themselves in diplomacy, conferences and international law, so there would be no loss of sovereignty in the voluntary surrender of powers to an international organisation. This he terms the "doctrine of original agreement." The present League of Nations is admirable in organic structure but is "largely a League of victors for perpetuating a position of diplomatic dominance won in battle rather than a general concert of power for common benefits" (476). But this will work itself out—indeed, Mr. Potter's consistent optmistic outlook seems to be *solvitur ambulando.*

The reviewer is so thoroughly in sympathy with the author's viewpoint that he finds it difficult to offer constructive criticism. Mr. Potter evidently wrote without a thorough knowledge of the recent materials upon the origin of the war, and leans to the conventional view-

point of Germany's guilt (205, 439, 458); but this does not affect his argument. In some dates he is original: Louis XIV died in 1715 rather than 1714; Charles VIII invaded Italy in 1494. He prefers English to foreign words: 'same' for 'ibid'; 'generally' for 'passim,' etc. The typography is excellent as usual in this series, but a few mistakes have crept in, as Treaty of Verdun 1843 (58). The documentation is thorough; but it is a little difficult to locate a reference for which only the author's name is given when the bibliography is divided into 29 alphabetical sections, and some of these subdivided.

It is a book which will stand a good deal of thoughtful reading.

CLYDE EAGLETON.

Southern Methodist University.

KENNEDY, A. L. *Old Diplomacy and New.* (New York: D. Appleton and Co., 1923. Pp. xxii, 414.)

This is a book for a leisure hour, when a little local color is desired to fill in a picture already well outlined. The title is a misnomer. It is mostly reminiscences over a badly scattered field by the European correspondent of a London paper, though in the last chapter he is lightly critical of English diplomacy. The first sentence gives the keynote: "Any typical Englishman is a potential statesman"; and the last paragraph ends up on the same theme: "Britain's diplomatists represent, for good or ill, the world's greatest political force." He is frankly imperialistic, condemning the pusillanimity of Gladstone which tempted Germany to challenge the position of England. "War," he says, "punishes decadence" (384). Chapter IV is irritatingly insular. The Venezuelan episode of 1895 was merely "twisting the lion's tail" and he notes the "recession of the United States from strident chauvinism to meek acquiescence." The book is a patriotic production, from the pen of a conventional Conservative. Its chief value lies in occasional interesting sidelights, such as Kuropatkin learning Turgeneff by heart in order to win over the Tsarina. One has a feeling of doubt as he reads, as to just how far the statements before his eyes can be accepted as authoritative. Some of the character portraitures are worth while, as for example in the case of Lloyd George.

The bibliography is of little value and is curiously arranged in sections at the end of each part. Sir Maurice Hankey, "Diplomacy by Conference" is quoted in one place as published in the *Round Table*, in another place as a book. There are many interesting, and some valuable, scattered facts, if one could only be sure that they were authoritative.

CLYDE EAGLETON.

Southern Methodist University.

GIBBONS, HERBERT ADAMS. *An Introduction to World Politics.* (New York: The Century Co., 1922. Pp. 595.)

This work is a timely presentation of the significant factors in the development of world politics during the period from 1815 to 1922.

Mr. Gibbons in his preface expresses the hope that he may include in one volume the salient facts of world relations since the Napoleonic Era, thus offering a background for the understanding of contemporary world politics. In this purpose the author has succeeded admirably. National self-consciousness, quickened in the French Revolution of 1789, is further accentuated by the economic developments after 1815, "Coal and iron became during the period from 1815 to 1848 the greatest sources of wealth and military power. This industrial era designated as the 'The Era of Steam,' brought in new elements of rivalry where the struggle was not one of dynasties, but one for world markets and,"...we often find nations fighting and hatred engendered over questions in which only investors and developers and traders have a direct interest. With this point in view, the author accepts as inevitable the culmination of economic and commercial rivalries in the Great War. The first twenty-four chapters deal with the colonial expansion of the European Powers, and the growing causes for friction that become more extensive and intensive as we approach the twentieth century. British, French, Russian, and German colonial problems are considered. The clash of interests in the Near East, in North Africa, and the Far East are well presented; and we note the increasing complications implied in the appearance of Italy and Japan on the field of International Politics.

Gibbons does not attempt to place the blame for the policy of expansion and exploitation at any one nation's door, but apparently feels that the nationalistic ambitions of all the leading powers were at fault. British policy is most frequently hit by implied or expressed criticism, but, as is pointed out, her statesmen have had the greatest opportunity to make mistakes because Great Britain's interests are more extensive than that of any other power. The contagion of world politics is not, however, limited to European powers, for Japan and the United States are each found to be apt players at the game. Regarding our attitude towards Colombia during the revolt of Panama the author remarks tersely:

> "The only comment that can be made upon this affair is that the American government showed great aptitude for the science of world politics."

Approximately one-half of the book takes up the discussion of the Great War and the international problems arising out of it. The Treaties of Versailles, St. Germain, Trianon, and Sevres are considered in separate chapters and in the terms of each of them the author finds evidence of the work of the politician rather than the statesman. Certainly events occurring since the appearance of the book tend to

substantiate Mr. Gibbons' contentions. The situation in the Ruhr and the Lausanne Conference indicate in some measure the limitations of the treaties that were supposed to restore peace to a war stricken Europe. In the Washington Conference for disarmanent the author finds real promise for international progress because it came in response to the demand of an enlightened public opinion.

"The World War had been a cataclysm and mankind had learned a lesson. Once more in a great crisis the masses of men proved to be the masters of men."

Recent events justify the reader in accepting this statement with some reservation, especially when he notes that the author apparently ignores the failure of the Conference to bring about the limitation of land armaments. However, in view of the fact that the work was completed so shortly after the Conference was held, it would be manifestly unwise to expect the judgment on the Washington agreements to be final.

The bibliographical material is well organized and fairly fulfills the author's purpose to present guides for further information. The maps also are well adapted to the purpose of the text. Those maps giving a graphic picture of the extension of colonial interests in Asia and Africa are especially useful.

Is it necessary for the author to assure us, apropos his discussion of Russia, "that a statement of facts does not necessarily mean that he is glad they are facts? The writer has no sympathy with the methods of Bolshevism and no faith in its economic theories." (See foot-note 1. p. 468.)

The intelligent reader, one hopes, will not convict a writer of Bolshevism for an honest effort to present the facts, and the unintelligent would probably overlook the explanatory foot-note.

University of Arkansas. T. G. GRONERT.

RALSTON, JACKSON H. *Democracy's International Law.* (Washington: John Byrne & Co, 1922. Pp. iv, 165.)

This book is a collection of essays and addresses to which a thread of continuity has been given by the affixing of the above title. The book is, in the main, a polemic against the legality of war as at present sanctioned by the principles of international law, and an argument for the application to nations of the same standards of conduct which govern individual relationship.

While the writer acknowledges as extant—and innocuous— the large body of conventional international law, and admits that there exists a flourishing adjective international law governing the procedural aspects of pacific international intercourses, he believes a great gap to exist between these and the more fundamental or substantive law of nations, which he claims to be in existence, but actually unrecognized. This law is discoverable from the condign punishment providentially visited upon its violators.

It is most surprising at this date to find a writer urging a return to natural law as a basis for the reconstruction of our international relationships, yet that is the object of the author. In fact the whole book in its pacifism is based on the utterly subjective concepts of natural law long since discarded by most authorities. It seems that many stern facts which do not fit in with the author's theories may be disposed of by terming them "prepossessions" of which we must rid ourselves. Thus sovereignty is regarded as a myth, a "figment of the imagination" (p. 40) and the author flatly denies (p. 110) that a nation has political interests beyond its own borders. Admitting that "no consistent theory of international law laying down the norm toward which all things must work has yet been propounded" (p. 1) the author hopes "to indicate the manner in which the world's puzzle must be solved"—"by tracing the consistent progress of law from the small unit to the large."

The denial of the validity of the so-called laws of war—and hence of those of neutrality—is incident to his plea for the absolute outlawry of war. Yet the means to this end are rather nebulous, as the author is candid enough to admit that international tribunals will not stop war, nor in themselves produce peace. The reader is left with the idea that some closer form of international association may help to reduce the exaggerated claims of states to unfettered independence, but nowhere is there any idea of the mechanism whereby this end is to be achieved; there is no discussion of the necessary reorganizatoin of the international society if a substantive international law is to be put into effect. In brief, the book seems to the reviewer inclined to be homiletic, a little platitudinarian, and impervious to international realities.

University of Texas. MALBONE W. GRAHAM.

THORPE, FRANCIS N. *The Essentials of American Government.* (New York: G. P. Putman's Sons, 1922. Pp. xvi, 190.)

It would be difficult to improve upon this work as a brief statement of the principles of government in the United States. The author points out the principal characteristic of the book when he states that his purpose is to draw attention to the principles which form the basis for the political institutions, omitting illustrative material which may be supplied by the lecturer or from other works. This distinction between *general formulas* and *unique facts* is one that is too seldom made and one that is clearly involved in every phase of government; that is, the law and fact.

If one opens this book with the expectation of finding a discussion of proposed changes in the government or a defence of the parts of the Constitution of the United States that have been attacked, he will be disappointed. There is very little included in this account except

the concise statement of the principles and purpose of the government.

The title may give one the impression that the work is a short account merely of the Federal Government. It is more. There is also a discussion of the principles of the state governments and their subdivisions.

In the introductory remarks the author discusses the relative value of principles and detailed facts in the teaching of government. No solution of the problem is proposed except that a part of the justification of the book is based on the belief that the forest is more important than the trees. However, the writer admits that there is no agreement among men on this question either from the standpoint of a course in government or of a text-book on the subject.

Chapters one and two treat of political theory in a general way. In these is given an account of sovereignty and the fundamentals of government. The following four relate to the parts of the American government; namely, the American state, the United States, the cities and the citizen. The next five treat of the law, its interpretation and enforcement, under the headings—the supreme law, the legislative, the executive, the judiciary, and the administrative. Chapters eleven and twelve have to do with the control of government through political parties and public opinion. There follows a chapter on international relations. The book concludes with a summary of the principles of American government. The appendix consists of a bibliographical essay, the Constitution of the United States and a list of cases cited.

The proposition that the people enact *laws* through *representatives* for the purpose of establishing *justice* summarizes the three fundamental principles emphasized in the work; which are justice, representative government, and government by laws rather than by men. It is easier to state that the representatives do not truly represent the people in making the laws and that the representatives do not strive to establish justice, than it is to find a fallacy in the ideal upon which the political theory of the United States government rests.

University of New Mexico. CHAS. F. COAN.

PORTER, KIRK H. *County and Township Government in the United States.* (New York: The Macmillan Co., 1922. Pp. xiii, 362.)

Since the publication of Professor Fairlie's pioneer work dealing with local government, the interest in and material about this important field of American government have been steadily increasing. Within recent years a sufficient number of studies have been made of the workings of the American system of local government to indicate that it is no longer the "dark continent of American politics." This, the latest addition to this field of political science, is written by Professor Porter of the State University of Iowa.

After a short chapter dealing with the meaning of the term "local

government," the author devotes two chapters to a brief sketch of the origin of the American system. Then follow three chapters dealing with the *Present Day Types of Local Government Organization, The Legal Status of the County and the Township,* and the *Functions of the County and Township.*

The greater part of the book (Chapters VII to XIV) is given to a rather thorough discussion of the duties of the various county officers. This portion of the work is undoubtedly its most valuable section.

Chapter XV deals in a rather sketchy but suggestive manner with the important problem of the *Reform of County Government.* The last two chapters treat of the government of the minor divisions of the county: townships, county districts, and small municipalities. Professor Porter believes that the government of small municipalities is primarily a problem of municipal government. Hence his very brief treatment of the subject.

While Professor Porter makes no original contribution of any considerable importance to the knowledge of this subject, he has prepared a readable and worthwhile text. However, it is to be regretted that he did not furnish a more complete bibliography, and more adequate references to his authorities, particularly in the part of the book dealing with the functions of the various county officers. His historical sketch seems to attach undue importance to the new England type(when one considers that only six states have ever had this system in its pure form) ; and no attention is paid to the development of local institutions between the colonial period and the present time.

University of Texas. B. F. Wright, Jr.

BOOK NOTES

A sincere faith in the ideal for which he is contending, together with a gift for phrasing his thoughts in attractive form would be sufficient to make Mr. Hoover's *American Individualism* (Doubleday, Page and Company, 1922) worthy of attention even if he were not a personage of very considerable prominence. However, it must be admitted that the little book seems to belong to the Utopias of political and social thought rather than to this world of facts in which we have to live. Despite the amount of compromise that Mr. Hoover introduces into his theory of individualism (for it is indeed a far cry from Mill's *Liberty* or Spencer's *Social Statics*), he seems to the present reviewer to fail to show how his ideas can be fitted to the existing order. For example, the period of the frontier is undoubtedly gone, and with its passage the conditions that stimulated the development of economic, political, and social individualism in this country have, in large part, disappeared. What is to take their place? Mr.

Hoover has no satisfactory answer. He seems content to say that "There will always be frontiers to conquer or to hold as long as men think, plan, and dare." But it may well be questioned whether such glowing phrases as this will help to solve the problem. His conclusion is of much the same caliber. "Progress will march if we hold an abiding faith in the intelligence, the initiative, the character, the courage, and the Divine touch in the individual." Progress has never been made so easily.

In his *Understanding Italy*, (Century, 1923) Clayton Sedgwick Cooper attempts to defend what is generally admitted to be a new Italy. A summary of the economic, social, and agricultural situation is made; the colonial policy of Italy is painted more idealistically than most students of modern imperialism will admit, but most interesting from the governmental standpoint, is his treatment of the Fascisti movement. Perhaps for the first time the rules of the Fascisti militia are published in English in full form. The title of the book is appropriate since the outlook of the writer is that of a conservative, nationalistic Fascisti militiaman, not the cold critic of violence, or the observer of parliamentary government in the peninsula. Fascismo is the spirit of a new, youthful and patriotic Italy built on the enthusiasm and labor of Mazzini, Garibaldi, and Cavour, and presided over by sane Savoyan monarchs. Parliamentary government, in many respects, "is an exotic plant in Italy," says Cooper, and for that reason the dictatorship of Mussolini is to be understood in terms of the Roman tradition rather than in conformity with governmental principles in England or the rest of the continent. Fascisti violence, the suppression of the opposition, too, are to be measured by the volatile attitude of the Italian rather than by constitutional stability in other governments. The new, young Italy is right, he says: Strong government is worth the price of violence and the parliamentary opposition, which is not heart and soul for the new movement, must be silenced.

Clarence Darrow's *Crime: Its Cause and Treatment* (Crowell, 1922) is a book designed to influence public opinion by appeal to the general reader. Its author is a lawyer of forty years' experience, including participation in several criminal trials. He brings to bear upon his discussion of crime a valuable practical knowledge, and also an acquaintance with the views of the best criminologists.

The general thesis of the book is that crime is the combined product of heredity and environment for which the individual is not responsible and that people who commit crime are in the same category with those who contract diseases. He therefore believes that the criminal should be treated on the same principle as the sick, i. e., segregated, and restored to normal life by sympathy and scientific treatment; that

criminal people should no more be punished than sick people. The remedy for crime, he thinks, is to be found only in the general improvement of social conditions by which the struggle for existence may be made easier.

The book is interesting, vigorous in style, broad in its scope, and highly enlightening.